# CASES

## ARGUED AND DETERMINED

IN

# THE SUPREME COURT

OF

## THE STATE OF MISSOURI

OCTOBER TERM, 1873, AT ST. LOUIS.

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EDWARD P. ROBINSON, Respondent, *vs.* THE MISSOURI RAILWAY CONSTRUCTION COMPANY, Appellant.

1. *Jeofails, statute of—Judgment by default—Reversal—What errors cured.*—A judgment by default cannot be reversed, impaired, or in any way affected, by reason of the omission of any allegation or averment, which would have rendered the petition demurrable, nor for the omission of any allegation or averment, without proving which the triers of the issue ought not to have given a verdict.

*Appeal from Lewis Circuit Court.*

*N. Rollins*, for Appellant.

*Dryden & Dryden, with whom was Alverson*, for Respondent.

Defendant's default was a confession of all the material allegations of the petition.

ADAMS, Judge, delivered the opinion of the court.

This was an action on a bill of exchange against the defendant as drawer.

The defendant failed to answer the petition, and a judgment was taken for the amount of the bill, damages, etc., as prayed for in the petition.

The case was submitted to the court, and the defendant objected to the introduction of the bill of exchange and the protest upon the alleged ground, that from the date of the bill of exchange and the date of the protest, it appeared to have been protested one day after the third day of grace.

This objection was overruled, and the defendant excepted. After the judgment was rendered, the defendant again raised the same objection by way of motion for a new trial, which was overruled, and this ruling was also excepted to.

The defendant's failure to answer the plaintiff's petition admitted his right of recovery, if the petitioner stated facts sufficient to constitute a cause of action. And the law is, that when a judgment is given on failure to answer, it cannot be reversed, impaired or in any way affected, by reason of the omission of any allegation or averment, on account of which ommission a demurrer could have been maintained, nor for omitting any allegation or averment, without proving which the triers of the issue ought not to have given a verdict. (W. S., 1036, § 19.)

It was competent to prove, that the date of the bill was wrong, or that the date of the protest was wrong, and that it actually fell due on the exact day it was protested. The want of an answer admitted, that the bill had been duly protested and that the defendant was liable for the same.

I see no error in the record. Let the judgment be affirmed; the other Judges concur.

HELEN TURK, Appellant, *vs.* SAMUEL STAHL, Respondent.

1. *Bills of exchange and promissory notes—Time of payment fixed—Days of grace—Statute, construction of.*—Bills of exchange and promissory notes, payable at a day certain are entitled to three days of grace. (W. S., 216, § 15; 217, § 18.)

*Appeal from Madison Circuit Court.*

*Fox and Duchouquette with Math. J. Clardy*, for Appellant.

I. All promissory notes are payable at the time indicated therein, absolutely and without days of grace. (W. S., 216, § 15.) Section 18, W. S., 217, merely adopts a different mode of expression.

*B. B. Cahoon*, for Respondent.

I. The note sued on, being for the payment of money to the payee therein named, or order, and expressed to be for value received, was negotiable, and in this State has the same effect as an inland bill of exchange, under the law merchant. (W. S., 216, § 15: Kel. Mo. Trea., 322–3.)

II. Inland bills of exchange, and negotiable promissory notes, are entitled, and subject, to three days of grace. (Brown vs. Harraden, 4 T. R., 148; 1 Pearson Notes and Bills, 393 and note; Bank of Washington vs. Triplett, 1 Pet., 25; Wood vs. Corl, 4 Metc., 203; Redf. and Big., Lead. Cas. Bills and Notes, 308; Story on Bills of Exchange, §§ 332–346; Ivory vs. Bank of Missouri, 36 Mo., 475; Lucas vs. Ladew, 28 Mo., 342; Kuntz vs. Temple, 48 Mo., 71.)

III. All contracts are made with reference to existing laws, and the three days of grace, though not generally expressed on the face of negotiable notes, or inland bills of exchange, enter into the contract of their making as much as though they were expressly agreed in the notes or bills to be given. (Ogden vs. Saunders, 12 Wheat., 213; Gracie vs. Marine Ins. Co., 8 Cranch., 75; Mills vs. Bank of U. S., 11 Wheat., 431; Bank of Washington vs. Triplett, 1 Pet., 25.)

IV. A demand made before the third day of grace is a mere nullity, and the same as if made before the instrument was due. (Ivory vs. Bank of Missouri, 36 Mo., 475.)

V. The suit was prematurely brought, and the plaintiff cannot recover in this action. (Estis vs. Tower, 102 Mass., 65; Gordon vs. Parmelee, 15 Gray, 413.)

VI. Sections 15, 18 and 19, Chap. 18, (W. S.,) are transcripts from the English Statute, and the words,—"shall be due and payable as therein expressed" &c.,—have always been construed to mean only, that no other proof of the date or consideration of the instrument, than that expressed on their face, shall primarily be necessary to make out a *prima facie* case, in the actions upon negotiable notes or inland bills of exchange. (W. S., 270, § 6.)

SHERWOOD, Judge, delivered the opinion of the court.

This was a suit originally instituted before a justice of the peace by Helen Turk against Samuel Stahl, on an instrument of writing in these words:

$100.00. Sept. 1st, 1871.

Ten days after date, I promise to pay Joseph Turk, or order, the sum of one hundred dollars, for value received.

SAMUEL STAHL.

The plaintiff, to whom the note had been transferred, instituted suit on the same on the 13th day of September, obtained service on the defendant on the same day, and subsequently recovered judgment for the sum specified in the note, and interest.

From this judgment the defendant appealed to the Circuit Court, which held, that as the note was entitled to three days grace, therefore that the action was prematurely brought, and gave a declaration of law to that effect. Thereupon the plaintiff took a non-suit, with leave, &c.,—and now insists, that because § 15 of that chapter of our statute, respecting Bills of Exchange, provides, that "Every promissory note for the payment of money to the payee therein named, or order, or bearer, and expressed to be for value received, shall be due and payable as therein expressed," that it must necessarily follow, that such notes fall due on the day mentioned on their face, and consequently, that days of grace are not allowable

on such paper, and the court below erred in so declaring the law.

There would be somewhat of plausibility in this view of appellant, were our attention to be circumscribed within the limits of the section above referred to.

But our examination must be of a more extended character. We must look to the whole of the act in question, as well as to the state of the law before the interference of statutory regulation.

By the law merchant, all bills of exchange, whether payable at sight, on demand, or at a day certain, were entitled to three days of grace. And the concluding words of § 15, *supra*, place the notes therein referred to, on the same footing "as inland bills of exchange."

Section 18 of the same act only prohibits days of grace as to bills &c., payable "at sight or on demand;" thus leaving the law as to bills and notes payable at a day certain, just as it was, prior to the enactment of our statute.

For these reasons, the judgment of the court below must be affirmed. The other Judges concur.

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CAROLINE I. FULENWIDER, *et al.*, Respondents, *vs.* JOHN P. FULENWIDER, Appellant.

1. *Cape Girardeau Court of Common Pleas, jurisdiction of—Equity.*—The Cape Girardeau Court of Common Pleas has jurisdiction of equitable actions. (Sess. Acts, 1853, p. 81.)

2. *Practice, civil—Pleadings—Abbreviations, use of—Money.*—The indication of Federal money by Arabic figures, preceded by the sign ($) to indicate dollars, and the cutting off of the last two figures by a dot to indicate cents, is permissible. (W. S., 420, § 15.)

*Appeal from Cape Girardeau Court of Common Pleas.*

*Lewis Brown and W. N. Nolle*, for Appellant.

I. The only way, in which the court below can rightfully obtain equity jurisdiction, is by a change of venue from the

Circuit Court (Sess. Acts 1853, p. 81, § 1; 82, §§ 5, 6); for courts of limited and inferior jurisdiction, and local courts, must keep within the prescribed powers of their creation. (Schell vs. Leland, 45 Mo., 289; State vs. Metzger, 26 Mo., 65.)

"The distinction between law and equity has not been abolished by the new code." (Meyers vs. Field, 37 Mo., 441.)

Hence, the court below erroneously exercised a jurisdiction which was not given to it by the act of the legislature creating it.

II. The petition nowhere states any amount of money for which plaintiffs bring suit. The terms "dollar, dollars, cent or cents," are not found in the petition or replication of plaintiffs. For some purpose unknown to the law a character ($) is made.

This character is not a word, part of a word, or an abbreviation of any word in the English language—true, we may know that it is extensively used to represent a value, or to fix a value; but this does not comply with the requisitions of the statutes. (W. S., 420, § 15; Goodall vs. Harrison, 2 Mo., 153.)

*Louis Houck*, for Respondents.

I. The Court of Common Pleas of Cape Girardeau county had jurisdiction of the cause. (Sess. Acts 1853, 81, *et seq.*)

The distinction between courts of law and equity has been abolished. The same court administers both legal and equitable relief in all civil actions as the case may require. (W. S., 999, § 1.)

II. The appellant now endeavors to escape the judgment, because the words "dollar or dollars, and cent or cents," do not occur in the petition, but only the abbreviation "$." To this we reply:

(*a.*) The petition contains a prayer for general relief; the petition plainly states a case for relief.

(*b.*) The statute provides, that abbreviations "now commonly used in the English language may be used." The abbreviation for the word "dollars" is "$" wherever the English language is spoken.

(*c.*) The word "dollar" written out in full, occurs in the replication.

(*d.*) The objection ought to have been made before verdict. (Saulsbury vs. Alexander, 50 Mo., 142; Jones vs. Louderman, 39 Mo., 287; Richardson vs. Farmer, 36 Mo., 35; Shaler vs. Van Wormer, 33 Mo., 386.)

III. The case of Goodall vs. Harrison, 2 Mo., 153 may be cited, but that case was a case at law, and was decided before our present liberal statute, in regard to mere technical defects had been enacted.

Adams, Judge, delivered the opinion of the court.

This was an action in the nature of a bill in equity charging, that the plaintiffs are husband and wife, and that the defendant had received certain large sums of money, which belonged to the wife for her sole and separate use, and that the defendant had appropriated them to his own use. The petition prays, that he be compelled to account for the money, and that a trustee be appointed to receive it for the wife, and make investments for her, for her sole and separate use.

The sums of money referred to in the petition are set out in Arabic figures, and the words dollars and cents are not written in full, but the dollar mark or abbreviation, thus ($), is used for dollars, and a dot cutting off two figures for cents.

The defendant by his answer denied all the material allegations of the petition, and in his answer used the same kind of figures and abbreviations the plaintiffs had to indicate dollars and cents.

The court found the issues for the plaintiff, and rendered final judgment as prayed for by the petition.

The defendant moved in arrest of judgment, alleging two grounds: First—That the court had no jurisdiction, this being an equitable proceeding; and Secondly—That the petition was bad, because the words dollars and cents were not written out in full.

The court overruled this motion, and the defendant has brought the case here by appeal.

The Common Pleas Court of Cape Girardeau County was

created by act of the Legislature in 1851, and this act was amended in 1853, extending the jurisdiction of the court throughout the county.

The sections conferring jurisdiction by the first act were repealed by the last act, and so we need only look to the last act to ascertain what jurisdiction was conferred on that court. (Sess. Acts, 1853, p. 81.)

By the first section it is provided, that the court shall have concurrent jurisdiction with the Circuit Court in Cape Girardeau county in all "civil actions at law." The same section provides, that this court shall have concurrent original jurisdiction with the justices of the peace in the township and city in all criminal cases.

At the time this act was passed, our code of civil practice was in full force as enacted in 1849. By this code the distinction between actions at common law and suits in equity was abolished, and it was declared, that only one form of action should exist in this State, to be denominated a "civil action." (Sess. Acts 1849, 73.)

Although the line of demarcation between cases in equity and cases at law still exists, there is but one form of action for all remedies. Therefore, when the Legislature used the phrase "civil action at law" in the above named act, it was to denote that no concurrent criminal jurisdiction with the Circuit Court was intended to be conferred.

There seems to be no good reason why this court should not have chancery as well as common law jurisdiction, and indeed such jurisdiction is expressly given by section six in regard to cases taken to that court by change of venue from the Circuit Court. If it was proper to confer it in these cases, why not in all cases? This court has been in existence for more than twenty years, and no such point as this has ever been raised that I am aware of. In my judgment the court had jurisdiction of the case.

The second point seems to be the merest technicality. If there was an error at all, it was cured by the statute of amendments, and could not be raised on a motion in arrest.

The marks for dollars and cents are evidently among the abbreviations embraced in section 15, W. S., 420, which are allowed to be used in records.

By our practice act it is provided, that it shall not be necessary for a party to set forth in pleadings the items of an account, but he may attach to his pleading, referring to it therein, a copy of the account, which shall be a part of the record.

In stating accounts, it has always been the practice to use Arabic figures and the dollar and cent abbreviations or marks to denote Federal money. It is known in all countries where our money circulates what these marks indicate, and it would be strange if the courts of our own country should be ignorant of their meaning.

The case of Goodall vs. Harrison, 2 Mo., 153, was determined long before our code of practice was enacted, and arose under the old common law pleadings, when substance was frequently sacrificed to form and technicalities.

It has no application to our present code of practice. The error in that case was using figures, instead of written words, to indicate the amount of damages claimed. Even under the old systems of pleading in courts of chancery, such a technicality would have been disregarded. In Murrill vs. Handy, 17 Mo., 406, this court held, that where the word "dollars" was entirely omitted in a note calling for "the sum of fifty-two 25-100," it would be necessarily implied by the use of the cent fraction 25-100, as there was no other denomination of money in use divisable into hundredths, except the dollar. (Grant vs. Brotherton, 7 Mo. 458.)

Judgment affirmed. The other Judges concur.

THE METROPOLITAN BANK OF ST. LOUIS, Appellant, *vs.* WILLIAM F. TAYLOR, LUCY G. TAYLOR, and CHARLES BOBB, Respondents.

1. *Husband and wife—Separate estate—What words create.*—Where by deed, or by decree of a court of equity, property is conveyed to a trustee "for the sole, separate and exclusive use, benefit and behoof" of certain parties, some of whom were unmarried females, such deed or decree creates a separate estate in such females, free from the control of any future husbands.
2. *Husband and wife—Separate estate—How charged.*—The separate estate of a married woman is liable for notes executed by her.

PER SHERWOOD, JUDGE, DISSENTING.

1. *Husband and wife—Separate estate—Deed, language of*—In order to exclude the *jus mariti* in an estate conveyed to a woman, the expression in the deed of the intention to do this must be clear and unequivocal.
2. *Husband and wife—Separate estate—Deed, language of—Decree, reforming deed—Petition, uncontradicted allegations of.*—Property was conveyed to A. in trust for his wife B., and their children, C., D. and E., the said *cestuis qui trust* were to have, hold and enjoy the same, with all the rights, improvements, &c., separate from said A., "their respective husband and father, as their sole, individual and exclusive property;" and the rents, profits and moneys accruing from the disposition of the property, or any part thereof, the said trustee was to pay over to the *cestuis qui trust*, or their order. Afterwards a petition was filed to correct the deed [B. was dead], and give the trustee greater power of sale, which error in the deed was alleged to be the fault of the scrivener, and to let in children subsequently born. The deed was corrected by the court. In the petition, whose allegations were not denied, C. and D. were alleged to have been under ten years of age, and E. only six months old, at the date of the deed. *Held*, that the deed, the decree, and the undenied allegations of the petition must be construed together, and that the husband of E. is not excluded from his marital rights in the interest of E. in this property.

*Appeal from St. Louis Circuit Court.*

*F. K. Ryan, with Daniel Dillon*, for Appellant.

I. It is immaterial what the language of the deed, as at first drawn, was, but all the parties must be governed by the deed as amended by the decree.

The words "sole and separate" are recognized by the law as expressly indicating the intention of the parties to exclude marital rights. (Wills vs. Sayers, 4 Madd. Ch. R., 216; Clancy on Rights, 263; 2 Story Eq. Juris., § 1382; Nix vs. Bradley, 6 Rich. Eq., 43; Goodrum vs. Goodrum, 8 Iredell Eq., 213.)

II. A separate estate may be created in a *feme sole* in like manner as in a *femme covert.* (Tullett vs. Armstrong, 4 Mylne & C., 376; Scarborough vs. Dorman, *Id.*, 377; Newland vs Paynter, *Id.*, 408; 2 Spence Eq., 524; 2 Bright, Husb. and Wife, 205; 2 Story Eq. Jur., 1384; Beaufort's Adm. vs. Collier, 6 Humph, 487; Phillips vs. Grayson, 23 Ark., 769; Schafroth vs Ambs, 46 Mo., 114; *Id.*, 580.)

III. There is no distinction as to the language to be used in creating a separate estate in a *femme sole*, and in creating such an estate in a *femme covert.* (—— vs. Lyne, 1 Younge, 562; Davis vs. Prout, 7 Beav., 288; Adamson vs. Armitage, 19 Ves. Jr., 416; Darkin vs. Darkin, 23 Eng. Law and Eq., 593; Snyder vs. Snyder, 10 Barr, 423; Fears vs. Brooks, 12 Ga., 195; Schafroth vs. Ambs, 46 Mo., 114.)

IV. A separate estate may be created in several by the same instrument; and a separate estate may be created in some of the beneficiaries mentioned in an instrument, and not in others, where the same language is used with reference to all. (Nix vs. Bradley, 6 Rich. Eq., 43; Anderson vs. Brooks, 11 Ala., 953; Bridges vs. Wilkins, 3 Jones Eq., 343; Thrash vs. Hardy, 31 Ga., 203.)

*C. C. Whittelsey*, for Respondents.

I. There is no such thing as a separate estate in a male. The law knows of no such estate, and yet to give Lucy G. a separate estate requires a different constitution to the same words which are applied to the estates given to her brothers. The brothers took an equitable estate in fee, and a fair construction requires, that the sister should take a similar estate, for the same words are applied to all in the same sentence.

II. A separate estate may be given to become separate upon the marriage of a *feme sole*, but it must appear from the deed or devise, that it was the intention of the donor or devisor to provide against the consequences of future marriage. (Benson vs. Benson, 6 Sim., 126; Knight vs. Knight, 6 Sim., 121; In re Gaffe, 1 McN. & Gord., 541; Scarborough vs. Borman, 1 Beav., 34; S. C. on Appeal, 4 Mylne & Cr., 378.)

Tullett vs. Armstrong, 4 Myl. & Cr., 377, discusses all the preceding cases and overrules Massey vs. Parker, 2 Myl. & Keen, 174. The cases all seem to turn on giving estates for life and forbidding anticipation. (Scarborough vs. Borman, 1 Beav., 34; S. C., 4 Myl. & Cr., 378.)

III. The intention of the grantor in the deed is manifest to give Mary H. Bobb, who was a married woman, a separate estate, but it was not intended to give Lucy G. a separate estate when she should thereafter marry. (Hawkes vs. Hubback, 11 Law R., (Eq. Cas.) 5; Evans vs. Knorr, 4 Rawle, 66; Stoebler vs. Ruerr, 5 Watts, 181; Hulme vs. Tenant, 1 Wh. & Tud. L. C. Eq., 394; Hill on Trustees, 419.)

ADAMS, Judge, delivered the opinion of the court.

The defendants, Wm. F. Taylor and Lucy G. Taylor, are husband and wife.

The wife joined with her husband in the execution of a promissory note for $1,900, which is held by the plaintiff.

This suit was brought to subject to the payment of this note the interest of the wife in certain real estate situated in St. Louis, the legal title to which is vested in the defendant, Charles Bobb, as trustee for her and others.

The material question is, whether the interest of Mrs. Lucy G. Taylor is held by the trustee for her sole and separate use, so that she could in equity bind it for the payment of the note executed by herself and husband.

Mrs. Lucy G. Taylor was formerly Lucy G. Bobb, one of the children of the defendant, Chas. Bobb, and his wife, Mary H. Bobb, and one of the beneficiaries in the deed of settlement hereinafter referred to.

On the 23d day of January, 1845, Hannah Letcher, who afterwards married John D. Stevenson, executed a deed of settlement, whereby she conveyed in fee to the defendant, Charles Bobb, as trustee, the real estate sought to be charged with the payment of the note referred to. The language of this deed declaring the trust is as follows:

"To have and to hold the same, with the rights, privileges, and appurtenances thereto belonging, unto him, the said

Charles Bobb, and to his heirs and assigns forever. In trust however, for the sole use, benefit and behoof of Mary H. Bobb (wife of said Charles Bobb), and of Charles L. Bobb, John H. Bobb and Lucy G. Bobb, children of said Charles Bobb, and to their heirs, executors, administrators and assigns forever. That they may have, hold and enjoy the same, with all the rights, improvements, buildings, &c., separate from said Charles Bobb, their respective husband and father, as their own sole, individual and exclusive property; and the said Charles Bobb of the second part, trustee as aforesaid, shall hold said property for the sole benefit of the said Mary H. Bobb, wife of the said Charles Bobb, and Charles L. Bobb, John H. Bobb, Lucy G. Bobb, and to their heirs, and shall obey their written instructions in all things relating to said property; shall rent, lease, mortgage, sell or dispose of the same, or any part thereof, for such consideration, to such person or persons, and in such manner as they, the said Mary H. Bobb, Charles L. Bobb, John H. Bobb and Lucy G. Bobb, their heirs or assigns, shall direct in writing; and the rents, profits and moneys accruing from such disposition of said property, or any part thereof, he shall pay over to said Mary H. Bobb, Charles L. Bobb, John H. Bobb and Lucy G. Bobb, or their order; and generally and in all things the said trustee and his heirs and assigns shall faithfully, according to the true intent and meaning hereof, discharge the trust herein created." At the time this deed of settlement was made, Lucy G. Bobb was the youngest child of Mary H. Bobb, and only six months old.

In the year 1853 Mary H. Bobb died, leaving as her only heirs-at-law the children mentioned in the deed of settlement, and two others subsequently born, Cora Bobb and George Bobb.

After the death of Mary H. Bobb, it was ascertained, that there had been a mistake made by the draughtsman in writing the deed of settlement, in not authorizing the sale and disposition of the property without the written consent of the beneficiaries. To correct this mistake, and effect a resettlement

of the property, the trustee, Charles Bobb, brought a suit in equity in the St. Louis Land Court, in the year 1854, joining the surviving beneficiaries, and Cora and George Bobb, subsequently born, children and heirs of Mary H. Bobb, as plaintiffs in such suit against Hannah Stevenson, formerly Hannah Letcher, and her husband, John D. Stevenson.

The petition filed in the Land Court assumes, that it was the intention of the deed of settlement to convey the land in dispute to Charles Bobb, as trustee, "for the sole, separate and exclusive use, benefit and behoof of the said Mary H., Charles L., John A., and Lucy G. Bobb, their heirs and assigns, forever," &c.

The prayer of the petition asks for a judgment reforming the deed so as to carry out the object and intention of the parties who executed the same: "That the said trustees shall forever hold the said real estate for the sole, separate and exclusive use, benefit and behoof of said parties, who are entitled to the equitable interest as aforesaid, their heirs and assigns, with power in said trustee," etc., and the "moneys or proceeds arising from any sale or disposition of the same, or any part thereof, to be paid over or held by the said Charles Bobb for the sole, separate and exclusive use and benefit of said parties as aforesaid holding or entitled to the equitable interest as aforesaid."

The Land Court rendered a judgment in conformity to the prayer of the petition. The substantial part of the judgment is in the following language:

"That said deed be reformed, and that said mistake in said deed be corrected as asked for in said plaintiff's petition, so as to carry out and accomplish the said object and intention of the said parties who executed the said deed as stated in said petition; that the title in fee simple of the said real estate be vested in the said Charles Bobb, the father of said minors, and forever held by him and his heirs, for the sole, separate and exclusive use, benefit and behoof of the said Charles L. Bobb, John H. Bobb, Lucy G. Bobb, Cora Bobb and George Bobb, their heirs and assigns, according to the

said deed as aforesaid, with full power and authority, however in the said Charles Bobb, trustee as aforesaid, to rent, lease, mortgage, sell or dispose of the said real estate, or any part thereof, for such consideration, to such person or persons, and in such manner as he, the said Charles Bobb, trustee as aforesaid, may deem best for the interest of the said parties entitled to the equitable interest in said real estate as aforesaid; and with full power and authority in the said Charles Bobb to execute and deliver such deeds and assurances, so as to pass and convey the same in fee simple; and all rents and profits arising from the same, and moneys and proceeds arising from any sale or disposition of said real estate, or any part thereof, shall be paid over or held by the said Charles Bobb for the sole, separate and exclusive use and benefit of the said parties entitled to the equitable interest as aforesaid."

At common law the wife was not allowed to hold property separate from her husband. For most purposes they were considered as but one person—the individuality of the wife being swallowed up in that of her husband. On the other hand, courts of equity, following the doctrines of the civil law, have for a great length of time admitted, that a married woman is capable of taking and holding real or personal estate for her sole and separate use, with the incidental power of disposition. And this doctrine has gradually grown up, and is now firmly established, that in regard to her separate property a married woman must be treated in almost every respect as a *feme sole*.

The only question is, under what circumstances property settled on a married woman will be deemed a trust for her sole and exclusive use.

The solution of this question depends upon the intention of the donor, to be gathered from the deed of settlement, or if it be by the decree of a court, from the terms of such decree creating the trust in her favor.

Although it is a matter which, upon the authorities, involves some nice distinctions, it may be laid down as a rule

of universal acceptance, when from the terms of the document creating the trust the property is expressly or by necessary implication designed to be for her sole and exclusive use, the rights of the wife will be fully recognized and sedulously protected in equity.

The question, however, still remains: What words are sufficiently expressive of such purpose, for the purpose must clearly appear, beyond any reasonable doubt, otherwise the husband will retain his ordinary marital rights.

Some words and phrases have been so often used in marriage settlements, and so frequently passed upon by the courts, that they have acquired a significance, which makes them rules of property in the interpretation of such instruments, and the courts are bound, when such words or phrases appear, to conclude the intent to be to exclude all the marital rights of the husband.

Judge Story, in his work on Equity Jurisprudence, says: "On the one hand, if the language of a marriage settlement made before marriage, or of a gift or bequest to a married woman after marriage, be that she is to have the property 'to her sole use or disposal,' or 'to her separate use or disposal,' or 'to her sole use and benefit,' or 'for her own use and at her own disposal,' or 'to her own use during her life independent of her husband,' or 'that she shall enjoy and receive the issues and profits,' or 'that it is an allowance as for pin-money,' (*eo nomine*); in all these cases the marital rights of the husband will be excluded and the property will be for her exclusive use. * * * * * * *
So a bequest to a married woman and her infant daughter, to be equally divided between them, share and share alike, 'for their own use and benefit, independent of any other person,' will be construed to mean 'for their sole and separate use.' So a bequest to a married woman, 'for her benefit, independent of the control of her husband,' will receive the like construction. In all these cases the words manifest an unequivocal intent to exclude the power and marital rights of the husband." (2 Story's Eq., § 1382.)

A distinction was formerly taken between settlements on married and unmarried women. It was at one time held in England, that property could not be secured to the separate use of a *feme sole*, so as to exclude the marital rights of a future husband. But this distinction has long since been exploded. If the intention appears in the deed of settlement to exclude marital rights, the husband must take the property as he finds it, protected from any invasion by him, and subject to the separate control of his wife. (2 Story's Eq., § 1384, and authorities there cited.)

From the doctrines there laid down it is plain to my mind that the language used in the deed of settlement, not only created a separate estate in Mrs. Mary H. Bobb, but also in her then infant daughter, Lucy G. Bobb.

The phrase used is precisely the same as some of those quoted from Judge Story, which have become rules of property in the creation of separate estates for married women. It can make no difference, that the same language was applied to the males. So far as the males are concerned it can have no meaning, as their individuality remains whether married or unmarried. But when applied to Lucy G. Bobb, as it was, it created a separate trust in her behalf in anticipation, and protected her interest from the marital rights of her future husband, Wm. F. Taylor.

It seems that this was the understanding of all the parties to the deed of settlement, for after the death of Mrs. Mary H. Bobb, when application was made to the Land Court, as a court of equity, to reform the deed and to have the property re-settled by a decree of that court, the petition declares, that the intention was to settle the property on Lucy G. Bobb, for her sole and separate use, and the petition asks for a decree so as to vest the title in the trustee for the sole, separate and exclusive use and behoof of the parties entitled to the equitable interest in the same. This decree was accordingly made, and the language used, beyond any doubt, created a separate trust in the defendant, Lucy G. Taylor.

The court had complete jurisdiction over the persons and

property in question, and it is no matter whether the primary object was to create a separate estate, or to modify the deed in other respects. It is sufficient, that the court acted in the premises, and entered a decree which remains in full force, whereby a separate estate was secured to the female beneficiaries. So, whether we look to the deed of settlement, or to the decree made long after the death of Mrs. Mary H. Bobb, the conclusion is inevitable, that the interest of the defendant, Mrs. Lucy G. Taylor, in this real estate, is secured to her for her sole and separate use. And as she thus had the exclusive control of her property when she executed the note held by the plaintiff, she thereby bound it for its payment.

In my opinion the judgment of the Circuit Court, which was for the defendants, ought to be reversed, and the cause remanded.

Reversed and remanded. Judges Vories and Wagner concur; Judge Sherwood dissents, and Judge Napton did not sit.

Dissenting opinion of Judge Sherwood.

This was a proceeding in the nature of a bill in chancery, instituted in the Circuit Court of St. Louis county by the Metropolitan Bank, to subject certain real estate to the payment of a certain promissory note executed by defendants, William F. Taylor and Lucy G., his wife, to one Joseph Geitner, and by him transferred to the bank; and it was claimed in the petition in the cause, that a certain undivided interest in said real estate was the separate estate of the wife, Lucy G., and therefore was charged with the payment of the debt specified in the note executed by herself and husband.

Charles Bobb, the father of Mrs. Taylor, and the trustee in whom the title of the real estate was vested, was also made party defendant to the suit.

On the hearing of the cause, the deed, which conveyed the property above referred to, was read in evidence, from which it appeared, that Hannah Letcher had in the year 1845 con-

veyed said real estate to said Charles Bobb, (her son-in-law) "In trust however for the sole use, benefit and behoof of Mary H. Bobb, (wife of said Charles Bobb,) and of Charles L. Bobb, John H. Bobb and Lucy G. Bobb, children of said Charles Bobb, and to their heirs, executors, administrators and assigns forever; that they may have, hold and enjoy the same with all the rights, improvements, buildings, &c., separate from the said Charles Bobb, their respective husband and father, as their own, sole, individual and exclusive property. And the said Charles Bobb of the second part, trustee as aforesaid, shall hold said property for the sole benefit of the said Mary H. Bobb, wife of the said Charles Bobb, and Charles L. Bobb, John H. Bobb, Lucy G. Bobb, and to their heirs, and shall obey their written instructions in all things relating to said property; shall rent, lease, mortgage, sell or dispose of the same, or any part thereof, for such consideration, to such person or persons, and in such manner, as they, the said Mary H. Bobb, Charles L. Bobb, John H. Bobb, and Lucy G. Bobb, their heirs or assigns, shall direct in writing, and the rents, profits and moneys accruing from such disposition of said property, or any part thereof, he shall pay over to said Mary H. Bobb, Charles L. Bobb, John H. Bobb and Lucy G. Bobb, or their order; and generally, and in all things, the said trustee, and his heirs and assigns, shall faithfully, according to the true intent and meaning hereof, discharge the trust herein created."

This deed, which was signed and acknowledged by both the grantor and the trustee, afterwards, (in 1854, the wife, Mary H. Bobb, having died the preceding year,) was so far reformed by a decree of the Land Court of St. Louis county, (which decree and accompanying papers were also read in evidence,) as to obviate the necessity of written instructions and directions from the beneficiaries, who were then minors, prior to a sale or other disposition of the property in question by the trustee, and to permit him to proceed in all respects as if no such clause making written instructions had ever been contained in the deed of trust. This was the only

change of any practical importance, which the decree purports to effect. It was admitted in evidence, that at the time of the execution of the deed from Hannah Letcher to Charles Bobb, that Lucy G. Taylor, wife of her co-defendant, William F. Taylor, was an infant six months old. This was all the evidence. Whereupon the court found for defendants, and after motion for new trial being overruled, and exceptions taken, this case comes here by appeal.

There is only one question in this case, and that is, whether the deed from Hannah Letcher to Charles Bobb, as it was originally drafted, or as subsequently reformed, created a separate estate as to Lucy G. Taylor's interest in the property conveyed. For although it was at one time held, that a separate estate could only be vested in a *feme sole*, as against a named or contemplated husband, and that such settlements upon single women, to the exclusion of the right of some future, but unknown husband, were inoperative; yet that doctrine was effectually exploded in Tullett vs. Armstrong, and Scarborough vs. Borman, 4 Myl. & Cr., 377, by Lord Cottenham, who, as master of the rolls, had decided the case of Massey vs. Parker, 2 M. & K., 174, the strongest of the cases, in which was enunciated the adoption of the ruling first above mentioned. The new principle then asserted in those cases of Tullett vs. Armstrong, and Scarborough vs Borman, *supra*, was distinctly this:

That no matter when property was vested in a woman for her separate use, whether she were single or married, that such property would shift with her condition; be at her disposal when single or discovert, and come anew into operation and vigor, when marital relations were entered into. And that ruling, it would seem, has been adhered to, both in England and in this county. (Sto. Eq. Jurisp., § 1384; Newlands vs. Paynter, 4 Myl. & Cr., 408; Hawks vs. Hubback, 11 Law R., (Eq. Cas.,) 5.)

In determining whether a separate estate, as to any of the *cestui que trusts* other than the mother, was intended to be created by the deed from Hannah Letcher to Charles Bobb,

that instrument must necessarily be considered in connection with the decree and with the petition, whose undenied allegations furnished the basis for, and gave rise to, the decree. In making this examination, effort must be made to discover, if possible, the controlling words in the deed, those which most strongly indicate the intention of the grantor, and then to ascertain, by a like scrutiny of the decree and its accompanying petition, whether any change, materially affecting the character or extent of the real estate, was effected by the decree; and the circumstances surrounding the execution of the deed should not be altogether overlooked, nor the parties who were to be benefited by that instrument—a mother and three small children, two boys, the eldest not over ten years of age, and the youngest child, a girl, (now Mrs. Taylor,) only six months old.

With matters then in this situation, the deed is made, the controlling words of which evidently are "That they (referring to the wife and children) may have, hold and enjoy the same, (referring to the property granted,) with all the rights, improvements, buildings, &c., separate from the said Charles Bobb, their respective husband and father, as their own, sole, individual and exclusive property."

This clause, I am confident, discloses the very gist of the grantor's intention, and sets up restrictions as to any rights, which Charles Bobb, "their respective husband and father," might otherwise have acquired; but raises no such barrier as against any one else whatever.

It is true that no technical words are necessary to the creation of a separate estate, but all the authorities agree, that the expression of the intention to do this must be clear and unequivocal. Judge Story (Story Eq. Jur., § 1381,) on this point says: "For the purpose must clearly appear beyond any reasonable doubt; otherwise the husband will retain his ordinary legal and marital rights over it," (the property.) In Rudisell vs. Wotson, 3 Dev. Eq., 430, in considering the effect of a bequest to a married daughter in these words, "to her and her heirs" proper use, C. J. Ruffin, speaking with regard

to whether this expression raised a separate use, says: "I am not sure that was not the meaning of the testator. I incline to think it was; but I am not sure it was. I conjecture so, because if he, (the testator) did not mean an absolute gift in the ordinary way, that is the next and most natural thing we could expect him to mean. But it will not do to guess. The husband cannot be excluded without plain recorded words or necessary implication. * * * * * Upon the whole therefore, although I think it more than probable, that the testator meant to exclude the husband, I am constrained to decide in favor of his right, because the conclusion is not manifest." In Ashcraft vs. Little, 4 Ired., 236, after citing with approval the decision in the case of Rudisell vs. Watson, the court, in passing upon the effect of a deed of gift to a married woman and her two sons, where the restrictive words used were, "But the said gift to extend to no other person," held that these words did not create a separate estate in the wife, especially as they extended equally to the gift to the sons, and after citing a number of authorities say: "These cases abundantly show, that to exclude the husband the intention of the settler must be clear, certain and unequivocally declared. This certainty, it is said, exists in this case by force of the words, "but the said gift to extend to no other person." Taken by themselves they might have that effect; but coupled as they are with others preceding them, we do not think so." And in speaking further of the intention of the donor in that case, the court say: "The husband cannot be deprived of his marital rights by conjecture however strong. There must be a certainty to that degree which shows, that the donor must have so meant, and could not have meant otherwise."

In Brown vs. Clark, (3 Ves., 166,) where the testator had devised to his brother and sister, Mary Brown, certain sums of money, the interest to be equally divided between them, "the principal to be lodged in bank or some other secure place; at the death of my sister, Mary Brown, then one-half of the principal to be equally divided between her children; the husband

of the said Mary Brown by no means to have any part whatever, but to be entirely for the poor children," it was contended, that those words created a separate estate in the wife as to her portion of the interest; but the court remarked upon that point, "It is said the words must mean that the husband shall have no part whatsoever of the interest before given; otherwise they are unnecessary and superfluous. That is admitted; but it is no uncommon thing for the testator to suppose, that the father would have the fingering of the money given to the children, and it might be inserted to prevent that." And accordingly, there was a refusal by the court to declare that Mary Brown had a separate estate as to the interest on the money.

These cases, and a great number of others of like sort, abundantly show, that the courts will not suffer the marital rights of the husband under the common law to the property of his wife, whom he is bound to support, to be defeated by inferences or conjectures; that this doctrine of a woman's separate estate, being a complete innovation on the common law, should not be given the loose rein of an unguarded interpretation, but should be curbed by just and reasonable restrictions. Otherwise an innovation, once established, would soon become the prolific progenitor of a countless offspring.

And the courts do but hold the same views with regard to the particular innovation under consideration, that they do towards similar departures from legal rules; as for instance, cases involving the doctrine of resulting trusts, or that of part performance.

For the natural tendency of all these innovations, like that of breaches, is to widen; and therefore the most cogent reasons arise to curb them within due bounds.

Mr. Hill, in his work on Trustees, (p. 421,) lays down the doctrine without any qualification, that "The trust must be for the benefit of the wife, exclusive of any other person; and a gift for the benefit of the children, as well as the wife, has been held not to create a trust for her separate use; although the terms of the gift would otherwise have been inopera-

tive." But the authorities, cited in the note in support of the text, would hardly seem to support the latter in all its broadness—though certainly having a bearing that way.

The circumstance however, that the mother is included with the children in the same gift, should not be without its due weight in determining, whether general words, which were clearly and immediately applicable as against "their respective husband and father," should be so extended as to operate to the exclusion of the *jus mariti* of the husband of her, who at the time the gift took effect was only a six months' infant.

That the donor intended to exclude the husband and father is manifest; that she so intended as to any other person is by no means "clear" nor "unequivocal." And the meaning of the deed of gift still remains as when drafted, unless an alteration therein was effected by reason of the decree, whose effect thereupon will now be considered.

And as before said, the petition is to be viewed in connection with the decree. It will be observed from the language of the petition, that Mary H. Bobb, the mother, was dead; that she left two children in addition to those who were named in the deed; that all the children were still minors, and the trustee, being desirous of selling one of the pieces of the donated property, "obtained legal advice to the effect, that as the said children of said Charles Bobb, the parties holding the equitable interest aforesaid, were minors under the age of twenty-one years, they could not legally give their written consent to sell the said lot of ground, so as to pass and convey the title in and by virtue of said deed drawn as aforesaid, and said plaintiffs aver, that the said scrivener made the said mistake, (alluding to the mistake made by the draughtsman, in inserting written instructions from the donees as necessary before the trustee could convey,) in drawing the said deed as aforesaid; and the said plaintiffs wish and are desirous, that the said real estate should be managed or disposed of in the way and manner which will be to their best interest and advantage, and that the original and avowed intention and under-

standing, as hereinbefore stated, of the said parties, who executed the said deed as aforesaid, should be carried out and fulfilled. They now apply for the aid of said court to reform the said deed, as aforesaid, so as to carry out and accomplish the said avowed intention, object and understanding of the said parties as aforesaid, &c." "The avowed object and intent" of the donor, as appears from the petition, was to convey the property precisely as it was conveyed, with the single exception, that no restrictions were to be placed on the trustee's power of disposition. The blunder of the scrivener in that sole respect was the whole "head and front of his offending," and the only ground of the petitioners' complaint.

It is true, that some loose language is employed in the petition and decree, but it must all be construed with reference to the point in hand, to the gravamen of the relief sought; and this is more especially the case, as the decree sets forth with precision the particular mistake referred to, and then says: "The court doth therefore order, adjudge and decree, that said deed be reformed, and that said mistake in said deed be corrected, as asked for in said plaintiffs' petition." Conceding then, (for the sake of argument, and my remarks in that regard are to be taken in that light) that the decree could have accomplished all that appellant claims it did, still I do not see how any different result, than the one already indicated, would follow; for no change is sought to be wrought but in the single particular I have mentioned, leaving the *status* of the parties to the deed otherwise untouched.

If Mrs. Bobb had remained alive at the time the reformation of the deed was attempted, is there anything in either the petition or decree, or circumstances of the parties, to show that that movement would not have been made? Not at all. The same necessity for "written instructions" from the children in order to part with their interests would still have existed—and as a matter of course, the same reason for obviating that necessity would still have existed.

Had the mother remained alive, she would only have been a mere formal party to the decree, for so far as her interests

were concerned, there is no doubt but her power of appointment would have been effective.

This also goes to show, in addition to what has already been said, that no modification of the deed was attempted, except as to restrictions thrown around the trustee's power of disposal.

But even if you take the decree just as it is, with all its surplusage, it makes no stronger case than that of Ashcraft vs. Little, *supra;* as the decree in this case, like the deed of gift in that, extends to the sons as well as to the daughter.

Whether then we regard the circumstances surrounding the parties at the time the deed was made, the language of the deed, its evident and clearly expressed intention, as contradistinguished from a meaning based on inferences or conjectures, or whether the very words of the decree are to govern, I can only come to the conclusion, that so far as the daughter, Mrs. Taylor, was concerned, no separate estate was designed to be created by the deed, or was established by the decree. And it may not be improper to add, that, at the last March term of this court, the late Judge Ewing fully concurred in this opinion. I am for affirming the judgment.

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J. W. DELVENTHAL, *et al.*, Appellants, *vs.* BENJAMIN F. JONES, Respondent.

1. *Practice, civil—Trials—Depositions—Informalities—Objection, when to be made.*—Objections to depositions on the ground of irregularities come too late at the trial. The proper way is to file a motion to suppress the depositions.
2. *Frauds, statute of—Goods worth over $30—Contract of sale, when not admissible in evidence.*—A contract of sale of goods, worth over $30, is not admissible in evidence, unless the buyer accepted part of the goods sold, and actually received the same, or gave something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing be made of the bargain, and signed by the parties or their agents lawfully authorized. [W. S., 657, § 6.]

*Appeal from St. Charles Circuit Court.*

*E. A. Lewis*, for Appellants.

I. The evidence of defendant's claim was inadmissible. The mere delivery of the sacks by plaintiffs to defendant was no acceptance or receipt of the goods purchased, nor was any such part performance by either party, as could take the case out of the statute of frauds. (W. S., 657, § 6; Harvey vs. Butcher's Ass'n., 39 Mo., 211; Cunningham vs. Ashbrook, 20 Mo., 562; Hatch vs. Bayley, 12 Cush., 27.)

*Frank T. Williams*, for Respondent.

I. The delivery of the sacks by plaintiffs to defendant was sufficient to take the case out of the statute of frauds.

II. The depositions were properly admitted in evidence, no objection having been made by plaintiffs before defendant offered to read them upon the trial. Plaintiffs ought to have taken their objections by a motion to suppress the depositions before going into the trial.

Sherwood, Judge, delivered the opinion of the court.

The plaintiffs brought suit before a justice of the peace against the defendant, on an account for $26.70 for sacks sold and delivered to him.

He admitted the correctness of the demand, but set up as an off-set thereto, that he had sold to plaintiffs 500 bushels of oats, at 40 cents per bushel; that they were to furnish the sacks in which to place the oats, and that the oats were then to be delivered to plaintiffs; that the sacks were thus furnished and filled with the oats, but plaintiffs, upon the oats being hauled to the point agreed upon, declined and refused to accept the same, by which refusal defendant was damaged in the sum of $64 91, for which he asked judgment, after the deduction of the amount confessed to be due plaintiffs.

The defendant had a verdict before the magistrate, the plaintiffs appealed to the Warren Circuit Court, from whence the venue was changed to the Circuit Court of St. Charles county, where the defendant again had a verdict and judgment accordingly, to reverse which judgment this cause comes up here on appeal.

During the progress of the second trial, the defendant was

introduced as a witness, and it was offered to prove by him, that he had sold the plaintiffs the oats at 40 cents per bushel; that plaintiffs were to furnish the sacks, which they did; that defendant offered to deliver the oats to plaintiffs in pursuance of the agreement, but that they declined and refused to accept the same, and the defendant thereupon sold the oats for the best price that could be obtained, &c., &c.

The plaintiffs objected to the introduction of this testimony on the ground (among others), that the alleged contract of sale was for goods exceeding in value the sum of $30; that there was no part of the purchase price paid, no note or memorandum in writing signed, no part of the oats delivered, and nothing given in earnest to bind the bargain, and that therefore the statute of frauds barred the defendant's set off.

The court overruled these objections, permitted the defendant to testify as above, and the plaintiffs excepted.

The court also allowed the defendant to read in evidence the deposition of one Merriman, to the reading of which the plaintiffs likewise objected, on the ground of various informalities, but their objections were overruled and they again excepted, and after verdict called the attention of the court to the error complained of by motion for new trial.

There was no error in the action of the court in respect to the deposition, the objection to which came too late.

A party should not be permitted to lie by and lull his adversary into a sense of security by failure to file any motion to suppress his depositions, thus induce him to announce himself ready for trial, and then count on springing the question of some informality on him, for the first time, when he offers to read those depositions in evidence.

But the objections of the plaintiffs were well taken to the introduction of the defendant's testimony in support of his set off.

Under our statute of frauds, when the price of the article contracted for exceeds $30—"unless the buyer shall accept part of the goods so sold, and actually receive the same or give something in earnest to bind the bargain, or in part pay-

ment, or unless some note or memorandum in writing be made of the bargain, and signed by the parties" * * * or their agents lawfully authorized—the contract of sale is void; and this sixth section of our statute, save as to price, is almost a literal transcript of section seventeen of the English statute of frauds. In the present instance none of the above modes of statutory designation—whereby the nullifying effects of the law respecting executory contracts of sale could have been avoided—were pursued.

It has been the uniform inclination of the courts of this State—and for the most part of courts elsewhere, both in England and in this country—to give the words of this statute full effect, and to refuse to sanction such a latitudinous construction of those words as would give rise to all the evils that the statute was enacted to prevent. (Kirby vs. Johnson, 22 Mo., 354; Lovelace vs. Stuart, 23 Mo., 384; Harvey vs. St. Louis Butchers' Association, 39 Mo., 211; Smith's Merc. L. 578, *et seq.*; B's. Stat. Fr., §§ 316, 317; Shindler vs. Houston, 1 N. Y., 261; Meredith vs. Meigh, 2 El. & Black., 363; Cusack vs. Robinson, 1 Best. and Sm., 297.)

The judgment is reversed, and the cause remanded; the other Judges concur.

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N. C. CHAPMAN, *et al.*, Defendants in Error, *vs.* MIJAMIN TEMPLETON, *et al.*, Plaintiffs in Error.

1. *Limitations, statute of—Adverse possession of land—Payment of taxes.*—The continuous payment of taxes on land is not sufficient of itself to show adverse possession.
2. *Limitations, statute of—Land, adverse possession of—Trespasser—Title, color of.*—A trespasser can acquire title, under the Statute of Limitations, only to so much land as he has the actual possession of; but one claiming under color of title, *bona fide* obtained, can acquire title to the whole tract, under the said statute, by possession of a part in the name of the whole.
3. *Lands and land titles—Conveyances by parol.*—Since the adoption of the common law in this State, conveyances of land cannot be made simply by parol.

*Error to Louisiana Court of Common Pleas.*

*Minor & Foster*, for Plaintiffs in Error.

*Fagg & Dyer*, for Defendants in Error.

I. The only purpose for which the tax-deed could have been used at all was to show color of title in the defendants, and inasmuch as they had failed to show possession for ten years, or evidence tending to show that fact, the deed was not competent for any purpose.

II. A donation of the block could not be shown by oral testimony.

ADAMS, Judge, delivered the opinion of the court.

This was an action of ejectment for a block of land in the city of Louisiana in Pike County.

The plaintiffs produced a clear paper title. The defendants relied on the statute of limitations, and for this purpose claimed under a tax sale as color of title, and introduced evidence tending to show, that they had in the year 1858 permitted the City of Louisiana to put a hog-pen on the block, about the center of it, which was used by the city for about two years, and then abandoned and went to decay, and was never used or occupied by the defendants.

The evidence tended to show, that the defendants had paid the taxes since they purchased at the tax sale.

The defendants then, merely to show color of title in connection with their possession, offered the tax deed which had been made to them in 1868, reciting the tax certificate of purchase in 1858. This deed was excluded by the court, and the defendants excepted.

They also offered to prove by parol, that the former owner of the block had conveyed it to the Catholic church. This evidence was also rejected, and the defendants excepted.

A verdict and judgment were given for plaintiffs, and the defendants filed a motion for a new trial, which was overruled, and they saved their exceptions, and have brought the case here by writ of error.

The only points relied on for reversal are the rejection of the tax deed, and the exclusion of the parol evidence to prove a conveyance of the block in dispute to the Catholic church.

In regard to the first point it is sufficient to say, that there was no evidence at all offered of continuous, open and notorious adverse possession of any part of the block for ten consecutive years. The continuous payment of taxes of itself is not sufficient to show adverse possession. The title of the real owner of land cannot be transferred to a stranger simply by his payment of the taxes for ten years.

The evidence here shows adverse possession for about two years of a hog-pen twenty by fifty feet in the center of the block, which was then abandoned and went to decay.

The object of showing color of title is to extend the possession of a part of a tract of land so as to include the whole tract. A mere trespasser can only claim the land of which he has the actual possession, so as to acquire title under the statute of limitations. But if he goes into the possession under the color of title, his possession of a part will extend to the whole tract as described in the defective conveyance. To this end a defective conveyance, or a conveyance from one having no title, if *bona fide* taken, may be used in connection with adverse possession of a part of a tract in the name of the whole, so as to acquire title under the statute of limitations. But as no continuous adverse possession was shown of any part of the block for ten years, the court very properly excluded the tax-deed.

Since the introduction of the Common Law into this State conveyances of land cannot be made simply by parol. The court therefore committed no error in rejecting the parol evidence of a transfer by the former owner to the Catholic church.

Let the judgment be affirmed. The other Judges concur.

THE CITY OF ST. LOUIS, Respondent, *vs.* THE LIFE ASSOCIATION OF AMERICA, Appellant.

1. *Statutes, construction of—General and particular statutes, prior and subsequent.*—A subsequent, general and affirmative act does not abrogate a prior one, which is particular, unless negative words are used, or unless the two acts are irreconcilably inconsistent; but a subsequent act, special in its character, conferring a direct grant of power, must prevail over a prior act refusing such power.

*Appeal from St. Louis Criminal Court.*

*Irwin Z. Smith*, for Appellant.

I. The general laws of the State exempt defendant from any liability to pay this license tax. (W. S., 752, § 40.)

II. The amended charter of the city (Sess. Acts, 1870, 464) gives the city power to license, tax and regulate insurance companies, but it does not repeal W. S., 752, § 40, and therefore, if both acts can stand, they will be construed so that both shall stand. While the law of 1869 stands in its application to this class of insurance companies, the law of 1870 will stand and apply to all classes of insurance companies, that are not exempt from this tax and license.

The law does not favor repeals by implication, when two statutes can both stand together; nor does a statute general in its application repeal a statute referring to a special matter, unless by direct words. (47 Mo., 149.)

*E. P. McCarty*, for Respondent.

I. Section 40, W. S., 752, was an exemption from taxation and therefore unconstitutional and void. (Life Ass'n Am. vs. Bd. of Assessors, etc., 49 Mo., 512.)

II. If otherwise valid, this section of the General Law is limited by the subsequent special provisions of the city charter subjecting these companies to the police and taxing power of the city.

WAGNER, Judge, delivered the opinion of the court.

We think there was no merit in the motion filed by the defendant to dismiss the proceeding on account of the insufficiency of the complaint, and that it was properly overruled.

The complaint was substantially good; technical accuracy was not required; it set out the title of the ordinance alleged to be violated, and referred to the section, article and chapter relied on; stated in what the supposed violation consisted, and sufficiently informed the defendant what it was called upon to answer.

The action was to recover a penalty for violating a city ordinance in doing business without taking out a city license, and the only question is, whether the defendant is exempt from the operation of that ordinance. The defendant is an insurance company, organized on the mutual plan, without any paid up capital stock, and claims, that under the statutory laws of this State, it is exempt from the license imposed by the city.

This claim of exemption is founded on section 40 of the act in regard to the incorporation and regulation of Life Insurance Companies, approved March 10, 1869, (W. S., Ed. 1870, 752.) That section provides, that the Life Insurance Companies referred to shall pay certain fees, which shall go to the support of the insurance department, and shall be in lieu of all taxes, fees and license whatsoever collected for the benefit of the State; but that companies organized under the laws of the United States or any other statute, doing in this State the business mentioned, shall be subject to existing laws relating to fees and licenses for county and municipal purposes. It is also provided, that all companies organized under the laws of this State, and doing the business mentioned, shall pay all the fees required in the section, which shall be in lieu of all fees and taxes whatsoever, except that they may be taxed upon their paid up capital stock, in the same manner as other property in the county, for county and municipal purposes.

The amended charter of the city of St. Louis, approved March 4th, 1870,(Laws of 1870, p. 464), gives the city power to license, tax and regulate Insurance Companies, banking or other corporations, etc. Under this amended charter, the city passed the ordinance now in question, declaring that no person or association or company of persons, or corporation, shall

carry on in the city, in person or by agent, the business of any kind of insurance, without a license for that purpose continuing in force.

The defendant here was organized under the laws of this State, and the fortieth section above adverted to does unquestionably, upon the payment of the fees therein mentioned, exclude it from the imposition of taxes for municipal purposes when it possesses no paid up capital stock.

The settled doctrine is, that a later statute, which is general and affirmative, does not abrogate a former which is particular, unless negative words are used, or unless the two acts are irreconcilably inconsistent. But in the present case, the charter is a subsequent act special in its character, conferring a direct grant of power, and authorizing the license provided for in the city ordinance. The language is explicit; the power is given to license, tax and regulate insurance companies. The former law, in general language, withheld the power, the latter especially gave it in direct terms.

The two cannot be made to stand and harmonize with each other, and therefore the last act must prevail. As the finding below was for the plaintiff, the judgment should be affirmed.

Judge Adams is absent. The other Judges concur.

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THE INHABITANTS OF THE TOWN OF MEMPHIS, Appellants, *vs.* JOHN O'CONNOR, Respondent.

1. *Ordinances—Fines, suits for—Particularity of statements.*—In proceedings to recover a fine for violation of a town or city ordinance, it is sufficient if the statements inform the defendant with reasonable certainty of what he is called upon to answer. The technical accuracy of an indictment is not required.
2. *Ordinances of towns—Fines, suits for—Statements therein.*—A suit to recover a fine for breach of an ordinance of a town organized under W. S., Ch. 124, is a civil action. A complaint on such a cause of action, whose only charge is, "that the defendant committed a certain offense contrary to an ordinance of the town," is bad, and the suit must be dismissed upon motion.

*Appeal from Scotland Circuit Court.*

*Nat. M. Gwynne*, for Appellants.

I. Technicalities should not be regarded in pleadings before courts of limited jurisdiction.

It was the duty of the Circuit Court to proceed to hear, try and determine this cause upon the merits.

*Keys & Knott*, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

The defendant was prosecuted, convicted and assessed to pay a fine in a proceeding before the town authorities for an alleged violation of an ordinance.

He appealed to the Circuit Court, where upon his motion the case was dismissed, and the plaintiff has brought the cause here.

The main question is, whether the complaint filed, and upon which defendant was tried, was so palpably insufficient as to justify the court in dismissing the case.

The only charge contained in the complaint was, that the defendant committed a certain offense contrary to an ordinance of the town. It is the well established doctrine in this State, that in proceedings to recover a fine for the violation of a town or city ordinance, it is not necessary for the statement to be as technical as an indictment. It is sufficient if it informs the defendant with reasonable certainty of what he is called upon to answer. (St. Louis vs. Smith, 10 Mo., 438.)

But tested by this rule, the complaint is not good. It refers to no particular ordinance; does not state what the penalty is for the supposed offense, nor does it allege such attendant circumstances as to advise the defendant of the cause of action.

The statute, which governs this proceeding, (W. S., (3rd Ed.) 1318, § 16) declares, that all fines and penalties accruing to any town, organized under the provisions of the statute, may be recovered by a civil action. But the complaint here would not be a good statement in any civil action, and there-

fore it cannot be permitted as a basis to uphold or sustain the proceedings. Nor do we think the court erred in refusing the application for an amendment. The amendment changed the character of the case, and was not allowable.

Let the judgment be affirmed. The other Judges concur, except Judge Sherwood, who is absent.

———o———

STATE OF MISSOURI to use of JAMES G. EARLY, Plaintiff in Error, *vs.* F. LEFAIVRE, *et al.*, Defendants in Error.

1. *Practice, civil—Trials—Written instruments—Who interprets.*—It is the duty of the court to ascertain and interpret the meaning of written instruments as a matter of law, and the duty cannot be shifted to the jury in the shape of questions of fact.

*Error to Warren Circuit Court.*

*Frank T. Williams*, for Appellant.

I. There is no ambiguity in the agreement.

*C. E. Peers*, for Defendants in Error.

I. The agreement was intended to apply to the justice's court alone, and the court committed no error in allowing it to be explained to the jury.

WAGNER, Judge, delivered the opinion of the court.

The plaintiff relies on two points to reverse the judgment of the court below: First—That the court erred in impaneling the jury; and secondly, that the decision was wrong in reference to the agreement entered into between the parties. The first question raised need not be considered, as it will probably not again occur on a new trial, and we think the judgment should be reversed for manifest error committed as to the second point.

From the record it seems, that four several attachment suits were commenced against the plaintiff, Early, before a justice of the peace, one being in favor of one Archer, and another in favor of the defendants in this case.

The cases were all precisely similar, and whilst they were pending in the justice's court, the parties entered into a written agreement, providing that the Archer case should be tried, and that all the remaining cases should abide the result of that case. Upon the trial the case was decided in favor of Archer, sustaining the validity of the attachment proceedings.

But the defendant there, who is the plaintiff here, appealed the case to the Circuit Court, where the judgment was reversed and the attachment dissolved and dismissed. The other cases were not appealed.

After the final decision in the Archer case, the plaintiff brought this suit on the attachment bond.

At the trial the court permitted the defendants to introduce evidence tending to show, that it was their understanding that the agreement only related to the result of the justice's court, and then instructed the jury, that if they found from the evidence, that the written agreement signed by the parties applied only to the trial of the Archer case in the justice's court, they should find for the defendants.

Under this instruction, the jury brought in a verdict for the defendants, upon which judgment was rendered.

The agreement was in plain unambiguous terms, and was not capable of being varied by parol testimony. It was, that the plea in abatement in all the remaining cases should abide the result of the Archer case. No particular court was mentioned, but the agreement extended to the final determination of the case, let it end where it would. Under that agreement the defendant in that case took it to the Circuit Court to produce the final result, and the other cases were allowed to remain in abeyance, awaiting the final result.

It is the duty of the court to ascertain and interpret the meaning of written instruments, as a matter of law, and this duty cannot be shifted to the jury in the shape of questions of fact.

The judgment of the Circuit Court should be reversed, and the cause remanded. The other Judges concur.

D. M. PUTERBAUGH, Plaintiff in Error, *vs.* TOWNSHIP BOARD OF EDUCATION OF TOWNSHIP No. 1, R. 6 and 7 EAST, IN JEFFERSON COUNTY, MO., Defendant in Error.

1. *Schools—Township boards—Contracts—Suits by teachers for salary—Statutes, construction of.*—A suit could be brought against a Township Board of Education by a teacher employed by the local directors for his salary, under the Statutes of 1865, (Chap. 46.)

*Error to Jefferson Circuit Court.*

*John J. Williams*, for Plaintiff in Error.

I. The Township Board of Education is responsible for the teachers' wages; it is a body politic with power to sue and be sued, while the local board has no legal existence as a person either natural or artificial, and hence can neither sue nor be sued. The whole tenor of the School law, plainly shows that the Township Board is the only responsible party. (R. C. 1865, Chap. 46.)

*Abner Green*, for Defendant in Error.

I. The Township Board of Education is not liable, on the contract made by the local directors.

II. The Township Board did not employ the teacher, nor hold any funds belonging to the sub-district, nor was it the duty of such board to procure the funds, nor did the teacher render any services for such board. (R. C. 1865, Chap. 46.)

III. By the School law, (R. C. 1865, p. 258, § 7,) the local directors are authorized to make certain contracts, for which the Township Board is responsible, but as the employment of teachers is not included in the class of contracts referred to in this section, the presumption is, that it was purposely omitted.

IV. The Township Board is authorized (R. C. 1865, p. 259, § 12) to employ and pay teachers for teaching in the central or high schools. Hence it is obvious, that such board is only liable for such contracts as it makes in the employment of teachers, and it is nowhere authorized to employ teachers in

the primary schools, but such power is expressly given to the local directors.

ADAMS, Judge, delivered the opinion of the court.

This was an action commenced before a justice of the peace for a balance alleged to be due the plaintiff for teaching a school in sub-district No. 2, which formed a part of the township of which the defendant was the Township Board of Education.

The contract for teaching the school was made in writing, the 1st of January, 1868, with the local directors of the sub-district, to teach a school for four months at $45.00 per month. He taught the school until his wages amounted to $92.61, and his account was audited; and the clerk of the Township Board of Education gave him an order on the County Treasurer for the same, on the 6th of May, 1868. He presented the order, and nothing was paid on it for want of funds, till in May, 1869, when he received $42.70; and he brought his suit for the balance of his account. He obtained judgment before the justice, and the defendant took an appeal to the Circuit Court, where the case was tried, and resulted in a judgment in favor of the defendant; and the plaintiff has brought the case here by writ of error.

The only material point presented by this record is, whether the local directors, or the Township Board of Education, were the proper parties to be made defendants.

This question grows out of the instructions given and refused by the court. The court instructed, that the defendant was not liable for the teacher's wages growing out of a contract with the local directors, and refused an instruction asserting their liability. This contract was made under the provisions of the school law, as found in General Statutes of 1865. This law was revised in 1868, after this contract was made, and also in 1870. Whether the local directors, under the law as it now exists, can be sued on a contract with a teacher, or whether his suit must be against the Township Board of Education, we are not now called upon to decide.

By section six of the School law of 1865, the local directors were expressly allowed to employ teachers, and also to dismiss them, provided such dismissal should receive the sanction of the Township Board. Section seven of the same law authorizes the local directors to make various contracts specifically named therein, and also to make "all other provisions necessary for the convenience and propriety of schools within their sub-districts." And all contracts, made by the local directors under the provisions of this section, must be reported to the Township Board of Education, &c. This section also provides, that the Township Board of Education, in their corporate capacity on the part of the sub-district, shall be held responsible for the performance thereof. (See General Statutes, p. 258.) There is no reason why a contract with a teacher should not come under the general provision referred to in section seven. In my judgment, that was the intention of the legislature. Section ten of the same law makes the Township Board of Education "a body politic and corporate" with power to sue and be sued.

In my opinion, the Township Board of Education could be sued on this contract, for the balance due the plaintiff.

Judgment reversed and cause remanded. The other Judges concur.

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STATE OF MISSOURI, to use of GEORGE GLENN, Guardian and Curator of WILLIAM W. ARNOLD, Appellant, *vs.* WILLIAM H. FIELDS, Administrator *de bonis non* of JNO. WRIGHT, deceased, *et al.*, Respondents.

1. *Curators—Statutes of 1855, construction of—New bond filed on order of the County Court—Liability of securities.*—Under the Revised Statutes of 1855, [825, § 18; 119, § 36; 120, §§ 39, 40, 41,] the giving of other or further security by a curator, as ordered by the County Court on its own motion, does not relieve the first bondsmen from any liability, but only operates as additional security; *semble*, that it would render both sets of securities equally liable as between themselves.

*Appeal from Monroe Circuit Court.*

*Brace & Howell*, for Appellant.

I. A new bond given in a proceeding had under §§ 36, 37, 38 and 39, (R. C. 1855, pp. 119, 120,) when approved, has the effect of discharging the former securities from liability for the misconduct of the principal after the filing of such new bond; but a bond given under § 41 is supplemental to the former bond, and does not discharge the securities in such former bond from liability for the misconduct of the principal after the filing of such supplemental bond, and there is no provision therein, granting any such discharge.

*Alexander & Anderson*, for Respondents.

I. The breach occurring after the filing of the last bond, these defendants are not liable, but the sureties on the last bond are liable. (State vs. Drury, 36 Mo., 281.)

Adams, Judge, delivered the opinion of the court.

This was an action on a curator's bond. The curator had been removed from office by the County Court, and the relator was subsequently appointed in his place, and brought this suit for monies alleged to have been converted by the former curator. The bond in suit was for four thousand five hundred dollars, executed in August, 1861, in the usual form of a curator's bond for infants.

In December, 1861, the County Court on its own motion issued a citation to the curator ordering him to give additional security. In compliance with this citation, the curator on the first day of January, 1862, executed another bond with security in the sum of $15,000.00, which was deposited with, and filed by, the clerk of the County Court. No entry was ever made on the records of the County Court, approving or rejecting the last bond; but the curator continued to make annual settlements, until he was finally removed, and the relator appointed. The evidence showed a balance still due from him, and that the default occurred after the execution of the bond in suit, and also subsequently to the bond given on the first of January, 1862.

The defense relied on was, that the bond given in January, 1862, discharged the former securities from any liability arising from the misconduct of the principal after filing such bond.

The case was submitted to the court sitting as a jury, and the court sustained the defense, and gave judgment for the defendants.

These proceedings were had under the Revised Statutes of 1855, and the rights of these parties depend upon the proper construction of the provisions of those statutes in regard to bonds of guardians and curators.

Section 18, of the act concerning guardians and curators, (1 Revised Statutes 1855, p. 825,) provides, that the County Court shall have power to order guardians and curators to give supplemental security, or a new bond with sufficient security, upon like notice, for the same causes, in the same manner, and with like effect, as is authorized by law in the case of administrators.

The administration law of 1855 provides three modes by which administrators may be required to give additional or supplemental bonds.

First, A creditor, heir, legatee, or other person interested in any estate, may apply to the County Court to compel the administrator to give another bond and security. (1 Rev. Stat., 1855, p.119, § 36.) Or Secondly, a security in an executor's or administrator's bond may apply to the court to require the principal to give a new bond under the provisions of section 37 of the same act. If the County Court orders such bond to be given, either at the instance of the creditor, heir, &c., or at the instance of the surety, the statute declares, that "such additional bond, when given and approved, shall discharge the former sureties from any liability arising from any misconduct of the principal after filing the same." (See § 39 of the above act.)

It is also provided by section 40, that if the principal fails to give the bond, when so required, within ten days, "his letters thenceforth, shall be deemed to be revoked, and his authority from that time cease."

After thus declaring the effect of a new bond, when given on the application of an heir, legatee, creditor, &c., or at the instance of a surety, the statute (§ 41,) empowers the County Court on its own motion, and on five days' notice, to order an executor or administrator to give other and further security. There is nothing in the statute declaring the effect of the bond which may be ordered by the County Court under section 41 on its own motion. The statute simply declares, if such further security be not given within ten days, the letters of the executor or administrator shall be deemed to be revoked, and his authority from that time cease.

It is manifest from the various sections referred to, and their position towards each other, that it was not the intention of the Legislature to discharge the sureties on the old bond, when a new bond and additional security had been given as required by the County Court on its own motion.

Under the act of 1825, these various provisions are comprehended in a single section, which expressly declared, that in any case, the new bond should have the effect of discharging the former sureties from subsequent liability. In the revision of 1835, the authority of a County Court on its own motion to order additional security was omitted. It was afterwards re-enacted, in 1843, without declaring what effect the additional bond should have; but it was left out of the revision of 1845, and was not re-enacted again till 1855, when it was placed in the Revised Statutes of that year, in such connection as to forbid the conclusion, that it was the intention of the Legislature, that the sureties on the old bond should be discharged simply by the execution of a new bond ordered by the County Court on its own motion.

The common law does not give such a bond that effect, and it would be an attempt at judicial legislation for the courts to so pronounce.

It seems to have been taken for granted by both sides in the court below, that if the new bond had been properly approved by the County Court, it would have discharged the defendants. And the instructions given and refused were formed with an eye to this point alone.

Under the view we take, it is unnecessary to pass on this point. For whether the bond was properly approved or not, it could not discharge the former sureties.

If properly taken and approved, it could only operate as additional security, and perhaps enlarge the field of contribution, so as to embrace both sets of securities, and render them equally liable as between themselves.

Judgment reversed and the cause remanded. The other Judges concur.

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JOHN G. SCOTT *et al.*, Plaintiffs in Error, *vs.* ALFRED H. SHY, *et al.*, Defendants in Error.

1. *Trustees' sales—Proceeds—Taxes—Prior incumbrances.*—Taxes due are a legal charge on lands, and ought to be paid before a sale under a deed of trust; but if this is not done, the trustee cannot apply the proceeds of the sale to the payment of the taxes, nor can he to the payment of a prior incumbrance, unless there was a special understanding or agreement, that, in order to make a clear title to the purchaser, the trustee should pay off the prior incumbrance.

*Error to Iron Circuit Court.*

*Reynolds & Relfe*, for Defendants in Error.

I. The rights and duties of the trustee depend upon the instrument creating the trust. (2 Wash. Real Prop., (3rd Ed.,) 482.) These powers are special and must be strictly pursued. (Balis vs. Perry, 51 Mo., 449; Wallis vs. Thornton, 2 Brockenb., 422.)

II. The trustee must first apply the proceeds, as far as they will go, to the costs and expenses of the trust, and to the extinguishment of the debt secured, for the payment of which he was appointed, before he can undertake settlement of other claims. This is the extent to which the authorities cited by plaintiffs go. (Doolittle vs. Lewis, 7 Johns. Ch., 45; Turner vs. Johnson, 7 Ohio, (2nd pt.) 216.)

III. In no case can the trustee apply the proceeds to pay off

prior incumbrances, (Helwig vs. Heitcamp, 20 Mo., 569;) though he may pay subsequent ones. (Mead vs. McLaughlin, 42 Mo., 198.)

IV. Plaintiffs, as subsequent incumbrancers, had a right to redeem from prior incumbrances by paying the money themselves. (Mullanphy vs. Simpson, 4 Mo., 319; *Idem*, 3 Mo., 492.)

*J. P. Dillingham*, for Plaintiffs in Error.

I. Taxes are a legal charge upon the estate. They may be paid off by the mortgagee or trustee, and added to the mortgage debt. (Willard's Equity, 448.) On the sale of the premises under a mortgage, it was represented, that the property was free from all incumbrances; but after the sale it was discovered that the property was subject to a city assessment and taxes. The court directed the master to discharge the incumbrance out of the proceeds of the sale. (4 John. Ch., 542.)

II. A junior mortgagee will be permitted to redeem a prior mortgage, and to sell the whole premises to refund to himself the redemption money, and to satisfy his own mortgage. (Willard's Eq., 445, 447; Western Ins. Co. vs. Eagle Fire Ins. Co., 1 Paige, 284; 4 John. Ch., 371; Bell vs. The Mayor, 10 Paige, 49; 11 Paige, 39; Moore vs. Beasom, 44 N. H., 215; Norton vs. Warner, 3 Edw. Ch., 106; 34 N. H., 92; 11 Gray, 276; 20 Iowa, 101; 1 Green Ch., 151; Penn vs. The Railway Co., Am. Law Reg., (Sept. 1872,) 582, 583; Dix on Subrog., 122, 116; 15 Cow., 137.)

III. If this is not the law, the plaintiffs have no means to recover back this money. (Lawless vs. Collier, 19 Mo., 480.)

Napton, Judge, delivered the opinion of the court.

This suit was brought in 1870 against defendants to recover balance due plaintiffs on a certain promissory note executed by defendants in October, 1868, due in twelve months, with interest at the rate of 10 per cent. per annum. This note was secured by deed of trust on certain lands described in said deed. These lands were sold on the 30th of November, 1869,

for the sum of $7,650, and this amount was applied, to expenses of trust and costs, $64.50, for taxes assessed against the Shy property, $59.70, for prior mortgage due school fund of Iron county, $338.95. The balance of $7,186.85 was paid by the trustee on the note.

And the plaintiffs brought their action, claiming that they were entitled to judgment for the note and interest, less $7,186, the credit placed on it by the trustee. The defendants in their answer admitted the costs and expenses of the trust, an item of $64.50, but they claimed that the items, of $59.70 for taxes, and $338.95 for paying off the mortgage to Iron county on account of school fund, were improperly paid out by the trustee, and should not be allowed. They also claim, that the note only bore 8 per cent. interest.

An agreed statement of facts was filed, which conceded the facts to be as stated in the answer; that the sums above stated were allowed by the trustee, and that the note only bore 8 per cent., but admit that the sum of $444.43, with interest from November 20th, 1869, at the rate of 8 per cent., was due. The court rendered a judgment for $810.50 for plaintiffs.

A motion for a new trial was filed, and the court took the case under advisement. At the next term this motion was overruled, and the defendants filed a motion in arrest of judgment, and this motion was sustained, and the court gave judgment for the defendants as follows:

"Wherefore it is ordered, adjudged and decreed, by the court, that the judgment heretofore rendered in this cause be, and the same is hereby, arrested, and held as null and void, and of no effect, as fully as if the same had never been rendered. It is further ordered and adjudged by the court, that the plaintiffs take nothing by their said suit, and that the defendants go hence without day, and recover of and from said plaintiffs the proper costs herein expended, and have execution therefor."

The bill of exceptions offered by plaintiffs was not signed, but the one offered by defendants was signed by the judge,

the former having been signed by the bystanders; but there is no point made on this here, as the facts agreed on are conceded by both sides.

The only point in this case is, whether the trustee had power, out of the proceeds of his sale, to pay off the taxes that had accrued on the lands embraced in the deed of trust before the sale, and further to apply the proceeds to paying off a senior incumbrance.

It is conceded that the final judgment for defendants was wrong, since the pleadings and agreed facts admitted an indebtedness of $446.44. But whether the original judgment for $810.50 was right, depends on whether the trustee had a right to charge for taxes, and to redeem a prior incumbrance.

Taxes are a legal charge upon the estate, and must necessarily be paid, and might have, and ought to have, been paid before the sale, but as this was not done, the purchaser at the trustee's sale takes the land subject to this incumbrance. (Willard's Eq., 446; Moore vs. Cable, 1 Johns. Ch., 385; Bell vs. Mayor of N. Y., 10 Paige, 49.)

And so in general under the English authorities, and the practice in many other States, prior incumbrances are required to be paid by a party asking to redeem.

In the case of Lawrence vs. Cornell, 4 Johns. Ch., 542, the court ordered the payment of the taxes, and directed the master to discharge the incumbrances, and the chancellor referred to Stretton's case, 1 Ves. Jr., 266, as an authority for this order to the master to redeem. So in the case of the Silverlake Bank vs. North, 4 John Ch., 370, the chancellor allowed the plaintiffs to retain, out of the surplus money arising from the sales, the amount with interest *advanced* by them to discharge a prior judgment, which was a lien on the land, and observed: "The payment of the money was an act which they were compelled to do for their own safety. The equitable doctrine of substitution applies to this case, and the plaintiffs must for the sake of justice be deemed to stand in the place, and partake of the rights, of the judgment creditor.

They have in view of equity, and under the circumstances of the case, a lien on the fund."

And in 1 Paige, 286, the chancellor says again: "If the prior mortgagees will not consent to a sale, or the amount of their incumbrances is not yet due, I do not perceive any valid objection to a decree for the sale of the equity of redemption subject to these mortgages, leaving the purchaser to pay the same as they become due, or whenever the prior mortgagees think proper to enforce their lien on the premises."

But while it is clear that a mortgagee may pay off a senior incumbrance, and reimburse himself out of the proceeds of a sale, and that Courts of Equity in decreeing foreclosures may direct the master to satisfy a prior incumbrance before sale, this case presents the fact of a payment of a prior incumbrance by a trustee, on a deed of trust out of the proceeds of a sale under a junior mortgage. No such power was given to him in the deed of trust under which he acted, and as he sold under the deed he sold only the equity of redemption, which was all the interest the defendants had in the premises.

The purchaser bought subject to the mortgage to Iron county, so far as the case shows. Undoubtedly, if there had been any special understanding or agreement, that, in order to make a clear title to the purchaser, the trustee would out of the proceeds pay off the prior incumbrance, such agreement would have been valid and authorized the trustee to act as he did in this case. But there appears nothing of the kind, and his payment of the mortgage to Iron county was therefore unauthorized, and the purchaser only acquired the title subject to the senior mortgage.

The judgment of the Circuit Court is therefore reversed, and the cause remanded, in order that a judgment may be there entered for the sum confessedly due, $446.44, exclusive of the taxes paid by the trustee, and mortgage to Iron county. The other Judges concur.

ISIDOR BUSH & SON, Plaintiffs in Error, *vs.* H. S. CHRISTIAN Defendant in Error.

1. *Practice, civil—Supreme Court—Verdict.*—In law cases where there is any legal evidence tending to uphold the finding, this court will not weigh the evidence.

*Error to Jefferson Circuit Court.*

*John L. Thomas & Bro.*, for Plaintiffs in Error.

I. The evidence is so overwhelmingly against the finding, as to shock the moral sense.

*Jos. J. Williams*, for Defendant in Error.

I. There being no question of law saved for review, this court will not weigh the evidence, especially as the preponderance of evidence is in favor of the judgment. (St. Bt. City of Memphis vs. Mathews, 28 Mo., 248; Backster vs. Hull, 28 Mo., 593; Jones vs. Plummer, 29 Mo., 456; McLean vs. Bragg, 30 Mo., 262; Thompson vs. Russell, 30 Mo., 498.)

VORIES, Judge, delivered the opinion of the court.

This action was brought by the plaintiffs on the following instrument of writing executed by the defendant:

ST. LOUIS, Nov. 12th, 1869.

Received of Messrs Isidor Bush & Son, two cases with grape vines on board the Steamer Pauline Carroll, amounting to $658.58-100, which amount I promise to pay as soon as I can collect and deliver the plants, latest within sixty days from date.

The petition averred, that defendant on the 19th day of March, 1870, paid of said amount $112, and on the 15th day of September the further sum of two hundred dollars, and had failed and refused to pay the remainder, for which plaintiffs asked judgment.

The defendant in his answer states, that the sole consideration for the instrument sued on was the sale and delivery to defendant by plaintiffs of a large quantity of grape plants, which plaintiffs contracted to deliver to him on board of a steamboat; that by said contract plaintiffs agreed to de-

liver well grown plants from mature wood, and were to be No. 1 plants; that it was understood by the parties, that the plants were being purchased to be shipped to, and sold in, Texas, and in view of that fact it was a part of the contract, that the plaintiffs would deliver the vines packed in cases in a good condition, so that they could be shipped to, and received in, the State of Texas in a good merchantable condition. The defendant then avers, that in violation of said contract plaintiffs delivered the vines on the steamboat,where the instrument sued on was executed, packed in cases so badly that about two-thirds of them died before they could be transported to Texas by the most expeditious means, or so soon thereafter that no sale could be made of them, and that, in consequence of the insufficient packing of the vines, two-thirds of them were worthless and wholly lost to defendant; that defendant had wholly relied on the representation of plaintiffs, that the vines were well packed, in making the purchase, and that he was ignorant of the insufficient manner in which the vines were packed, until the cases were opened in Texas. The defendant then averred, that in consequence of the insufficient manner in which the vines were packed, he was damaged in a sum larger than the amount remaining unpaid on the instrument sued on, and prayed judgment for his costs, etc.

The plaintiffs in their replication to the answer admitted the contract as stated, but denied the violation charged, and averred that the grape plants were well and skillfully packed, etc.

A jury was waived, and a trial had by the court. The defendant was examined as a witness, and by his evidence sustained the facts relied on in the answer, if credit is given to his evidence.

The plaintiff offered in evidence two letters written by the defendant to the plaintiff, one written a few days after the grape vines arrived and were opened in Texas, and the other about five months afterwards; by both of these letters he promised to pay for the vines, and in neither of which did he

make any mention of the bad condition of the vines, or that they had been improperly packed. In the last of these letters he stated, that he would pay for the vines in good faith as soon as he could get money from Texas. It was also proved by the plaintiffs, that defendant had, in the first part of August, about five months after the vines had been received in Texas, paid two hundred dollars on the debt for the vines, and had given a deed of trust to secure the payment of the balance, and had then promised to pay the balance in six months from that time, and that he then made no mention of the fact that the vines had not arrived in good order.

The defendant attempted to explain these letters and promises in his cross-examination by saying, that at the time that he made these promises he had sold a part of the vines on the condition, that the purchasers would pay for them if they grew, otherwise they were not to pay, and that he hoped that he might be able to collect for these vines, and if he did he had concluded to pay the whole demand rather than have a law suit or trouble, but he afterwards found that the vines had not grown, and that he then concluded to resist any further payment to plaintiff. This was substantially the evidence in the case.

The court made two declarations of law at the request of the parties, neither of which is objected to by either party, and, in fact, no question of law is raised by the record in the case.

The court found the issues for the defendant, and rendered a judgment in his favor for costs. The plaintiffs filed a motion for a new trial,which being overruled they excepted, and have brought the case here by writ of error.

There is not a single question of law presented in the record of this case. We are asked to review the finding and judgment of the trial court upon the facts as presented in the evidence. It is contended, that the acts of the defendant, subsequent to his purchase of the vines, as shown by the evidence, were sufficient to wholly discredit and destroy the evidence given by him in his own favor; whether this is so or not, was

the exact question passed on by the court that tried the case. It has been so often held by this Court, that where there is any legal evidence tending to uphold the verdict of a jury or the finding of a court as to the facts in issue, this court will not interfere with the finding, that it is not necessary to refer to the cases on the subject.

The other Judges concurring, the judgment is affirmed.

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STATE OF MISSOURI, Respondent, *vs.* JESSE JONES, Appellant.

1. *Practice, criminal—Indictment—Disturbing religious worship.*—An indictment for disturbing a congregation met for religious worship, etc., (W. S., 504, § 30) is not sustained by evidence of a disturbance in the church yard after the congregation had been dismissed.

*Appeal from Warren Circuit Court.*

***Frank T. Williams, with whom was John C. Orrick***, for Appellant.

I. This was not a congregation "met" or "assembled" at the time the acts complained of were committed, and the defendant is not guilty as charged in the indictment. (32 Mo., 548.)

ADAMS, Judge, delivered the opinion of the court.

The defendant was convicted on an indictment for disturbing a congregation, met for worship.

The indictment was framed under section 30, 1 W. S., 504, which reads as follows: "Every person who shall willfully, maliciously or contemptuously disquiet or disturb any camp-meeting, congregation, or other assembly, met for religious worship, by making a noise, or by rude or indecent behavior, or profane discourse within their place of worship, or so near to the same as to disturb the order or solemnity of the meeting, or menace, threaten or assault any person there being, shall be deemed guilty of a misdemeanor, and punished by a fine not exceeding one hundred dollars, and if unable

to pay the fine, by confinement in the county jail not exceeding three months."

On the trial the only evidence offered or given, as stated in the bill of exceptions, tended to show, "that after the congregation had been dismissed by the minister and while the people were in the act of starting for home, some still in the church and others in the act of coming out of the door, others standing and talking in the church yard and near the door, and others on horses and in vehicles starting home, the defendant engaged in an assault, using loud and violent language in the church yard and close to the door of the church, frightening and annoying some of the persons who had just been attending divine worship."

On the part of the defendant the evidence tended to prove, that "his participation in the difficulty was after the people had all gotten out of the house and were preparing to go home. The preacher had come out and mounted his horse and started home, when hearing the loud talking he rode up and requested the parties to have no further difficulty; that the defendant then turned and started away," etc.

There was no evidence at all to show that the alleged disturbance occurred before the minister dismissed the congregation.

The court, on its own motion, instructed the jury as follows:

"To convict the defendant, the jury must believe from the evidence, that his acts or declarations disturbed the devotions of some of the congregation assembled for religious worship, or that his acts or declarations prevented some portion of the congregation in the immediate exercise of such holy thoughts and pious reflections as are presumed to result from a religious meeting. The punishment prescribed for the offense charged in the indictment is a fine of not more than one hundred dollars."

The defendant excepted to the ruling of the court in giving that instruction, and on his part asked the court to instruct:

1st. "If the jury believe from the evidence, that the acts complained of on the part of the defendant were not committed until after the congregation were dismissed, they will find the defendant not guilty. And, although the jury may believe from the evidence, that the defendant engaged in an assault, and that the defendant used loud and boisterous conversation near the church door, or in the church yard before the congregation had dispersed; yet if they further believe from the evidence, that the acts were committed under sudden impulse, and not willfully, maliciously or contemptuously, they will find a verdict of not guilty."

2d. "In order for the jury to find the defendant guilty, they must believe from the evidence, that the congregation were assembled for the purpose of religious worship, and further, that, if the congregation were disturbed, they must be satisfied that the disturbances were caused by the acts of the defendant."

The court refused the defendant's instructions and he excepted.

The section on which the defendant was indicted describes two distinct classes of offenses. The first consists in willfully, maliciously or contemptuously disquieting or disturbing a camp-meeting, congregation or other assembly of people, met for religious worship, by making a noise or by rude or indecent behavior, or profane discourse, &c.

The second consists in menacing, threatening or assaulting any person there being. (State vs. Bankhead, 25 Mo., 558.)

The offense charged against the defendant is of the first-class.

The acts necessary to constitute this offense must have been committed willfully, maliciously or contemptuously, and yet the instruction given by the court, on its own motion, entirely ignores these essential ingredients.

It is plain to my mind, that there was no evidence to support the charge.

All the evidence, as shown by this record, tended to prove, that the congregation had been dismissed before any of the acts charged against the defendant, had been committed.

After the minister in charge dismisses his congregation, it then ceases to be a congregation met for religious worship. There must be some point of time when the purpose for which the congregation met is ended; and that time has always been understood to be when the head of the congregation dismisses it. When so dismissed, the people engage in such secular or other conversation, &c., &c., as may suit their pleasure. If the defendant engaged in an assault after the dismissal of the congregation, it was an offense against the laws, but not the offense charged in the indictment.

I see no substantial objections to the instructions which were asked by the defendant, and the court erred in refusing them, and also erred in instructing the jury, as above indicated, on its own motion.

Let the judgment be reversed, and the cause remanded; the other Judges concur.

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CASPAR ROTH, *et al.*, Appellants, *vs.* DIEDERICK F. TIEDEMAN, *et al.*, Respondents.

1. *Cape Girardeau Court of Common Pleas—Jurisdiction—Mechanics' liens—Statute, construction of.*—The Cape Girardeau Court of Common Pleas has jurisdiction of actions for the enforcement of mechanics' liens. [Sess. Acts 1853, p. 81, § 1.]

*Appeal from Cape Girardeau Court of Common Pleas.*

*Lewis Brown*, for Appellants.

I. The Cape Girardeau Court of Common Pleas has jurisdiction of actions seeking to enforce mechanics' liens. (Sess. Acts 1853, p. 81, § 1; W. S., 999, § 1.)

II. The cases of Schell vs. Leland, 45 Mo., 289, and Gaty vs. Brown, 11 Mo., 139, cited by defendants, do not apply, for the jurisdiction of the courts referred to was expressly limited.

*Louis Houck*, for Respondents.

I. The act, creating the Court of Common Pleas of Cape Girardeau county, does not confer jurisdiction on the court to enforce mechanics' liens. (Sess. Acts 1853, p. 81.)

II. The act organizing the court being silent on the matter, it is necessary to bring suit to enforce a lien in the Circuit Court. (W. S. 907, § 5, *et seq.*; Gaty vs. Brown, 11 Mo., 139; Schell vs. Leland, 45 Mo., 289.)

SHERWOOD, Judge, delivered the opinion of the court.

This was an action brought by Caspar Roth and others, in the Cape Girardeau Court of Common Pleas against Diederick F. Tiedeman and the Board of Education of the City of Cape Girardeau, to enforce a mechanic's lien against certain property in that city.

The court dismissed the case on the ground, that it had no jurisdiction for the enforcement of such liens, and this is the only question presented by the record.

Section 1, of the supplementary act of 1853, relating to that court provides, that it shall have "concurrent original jurisdiction in all civil actions at law with the Circuit Court."

This language is very comprehensive, and is sufficiently broad to embrace suits for the enforcement of liens of the kind above mentioned, although not specifically named.

But we are cited by respondents to the case of Gaty vs. Brown, 11 Mo., 139, as showing that the same words, when used by the statute defining the jurisdiction of the St. Louis Court of Common Pleas, have received a widely different construction by this court.

An examination of that case, however, will clearly show, that that decision was based not on those words alone, but also upon the effect to be given to the statute concerning mechanics' liens in the city and county of St. Louis, and to § 22, p. 699 of the Revised Statutes of 1845, which continued in force all acts and parts of acts specially applicable to that city and county.

For Judge Scott, in delivering the opinion of the court in Gaty vs. Brown, *supra*, says:

"If this question depended upon the general law relative to the liens of mechanics, there would scarcely be a doubt of the jurisdiction of that court, as by the law of its organization, it has concurrent original jurisdiction in all civil actions at law with the Circuit Court:" And then proceeds to show the modification as to that jurisdiction effected by the statute above referred to.

Respondents also cite us to Schell vs. Leland, 45 Mo., 289, in support of the views which they urge. But in that case, there is nothing passed upon by this court having the remotest bearing on the point in hand.

It is only asserted in the conclusion of that opinion, that the Kansas City Court of Common Pleas had jurisdiction to enforce mechanics' liens only in Kaw Township, and that a petition filed in that court was fatally defective in not alleging that the property, as to which such a lien was attempted to be enforced, was situate in that township.

It is difficult to perceive how the legislature could have employed more plain and unambiguous language as to the jurisdiction intended to be conferred, than in the act now under consideration. By the very terms of that act, the jurisdiction of the Cape Girardeau Court of Common Pleas is made coextensive with the Circuit Court *in all* civil actions. To hold that this sweeping clause does not include actions for the enforcement of mechanics' liens, would be to rob words of their manifest meaning.

The judgment is reversed, and the cause remanded. The other Judges concur.

JASPER BELKIN, Defendant in Error, *vs.* GEORGE HILL, DAVID GRIFFIN, and THE LAMOTTE LEAD COMPANY, Plaintiffs in Error.

1. *Replevin—Indemnity bond—Officers, liability of—Statute, construction of.*—The taking of an indemnity bond from the plaintiff by an officer, who has seized property under an execution, does not release the officer, nor the plaintiff ordering or assenting to such action, from liability to a replevin suit by the owner of the property.

*Error to St. Francois Circuit Court.*

*John F. Bush*, for Plaintiffs in Error.

I. The taking of the indemnity bond by the officer released him from all liability to an action by the claimant who gave notice of his claim. (W. S., 607, § 28; 608, § 29; Stewart vs. Thomas, 45 Mo., 42; Stewart vs. Ball's Admr., 35 Mo., 209; State vs. Leutzinger, 41 Mo., 498; State vs. Doane, 39 Mo., 44; Bradley vs. Holloway, 28 Mo., 150; St. Louis, A. & C. R. R. Co. vs. Castello, 28 Mo., 379; State vs. Watson, 30 Mo., 122.)

The word "may" in section 29 (W. S., 608), beyond question, has an imperative force; imports an exclusive idea and creates an exclusive remedy. (Leavenworth & D. R. R. Co. vs. County Court of Platte Co., 42 Mo., 171; Steines vs. Franklin county, 48 Mo., 167.)

II. Beyond doubt the policy of this statute, the intention of the Legislature in the enactment of these provisions, was to protect officers against vexatious actions for seizure of property in the course of official duty. (Bradley vs. Holloway, 28 Mo., 150; State vs. Doane, 39 Mo., 44.)

III. The claimant has a clear option either to present his claim to the officer (under the statute and in pursuance of the provisions thereof), and thereby elect the remedy of an action on the bond, which the statute provides, or hold his peace, and by his silence retain his original remedies. (Stewart vs. Ball's Admr., 35 Mo., 209; Bradley vs. Holloway, 28 Mo., 150.)

IV. The statutes of 1855 contained a provision debarring claimants, who gave notice of their claims, from all actions

against officers after the taking of indemnifying bond, except in case of insolvency of bondsmen. (R. C., 1855, p. 744, § 2.)

The present statutes contain no express repeal of this section, nor was there any such repeal by implication without manifest repugnancy of provision, which nowhere appears. The law never favors repeals by implication and allows such repeals only for manifest repugnancy. (Sedg. Stat. & Const. Law, 123–127; Dev. Stat., 533; Deters vs. Renick, 37 Mo., 597; State vs. Judge of St. Louis Probate Court, 38 Mo., 529; State vs. Draper, 47 Mo., 29.)

V. The 32d section of the statutes of 1855 was surplusage, an embodiment or expression of the legitimate effect of the preceding sections.

*W. N. Nolle*, for Defendant in Error.

I. The provisions in the execution law of 1855 were expressly repealed by the revised statutes of 1865. (W. S., 896, § 2.)

II. The cases cited by defendants arose under the statute of 1855, or under a local law specially applicable to the County of St. Louis.

III. The bond to be taken after notice of claim shall be for the full indemnification of the officer making the seizure, and not to indemnify particularly the claimant. (W. S., 607, § 28.) Hence, the reasonings of this court as applied to the local act, or execution law for St. Louis county, in the several cases arising thereunder, do not apply to the execution law of 1865. The general execution law of 1865 does not exempt the officer making the seizure from liability.

Napton, Judge, delivered the opinion of the court.

This action is replevin to use the name by which it was known before the adoption of our practice act, or a suit for the delivery of personal property, as it is termed in the 6th article of this act. It was originally brought in Madison county and was against the sheriff and his deputy, and, before its removal to St. Francois county, the Mine LaMotte

Lead Company was, on its application, made a defendant, and afterwards on the application of said defendants, and the affidavit, required in such cases, by the Company or its Secretary, it was removed to and tried in St. Francois county.

The action is for the delivery of a horse to the plaintiff, which had been levied on as the property of one Herzinger on a judgment and execution in behalf of the LaMotte Lead Company against said Herzinger.

The question of the title to the property was submitted to a jury on instructions, and upon evidence, to which no serious objections have been urged, and therefore the finding in this respect must be held right, and the only point in this case relates to the proper construction of our present execution law, which is found in the Revised Code of 1865, pp. 607, 608, §§ 28, 29.

There was an indemnifying bond given to the sheriff by the Mine LaMotte Lead Company, and it is claimed that a suit on this bond by the claimant is the proper and only remedy which he has, and that the officers, the sheriff and his deputy, are exempted by the statute from any liability to an action.

That this exemption existed under the General Statutes of 1855, and under the special acts which regulated the subject in St. Louis county, is conceded. Various decisions of this court are cited to show this, and it is argued now, that the law of 1865 is substantially the same, and was so intended by the Legislature.

But it will be seen, that the laws are materially different in several respects. Under the laws of 1855, and previously, (p. 742, § 26) the claimant was required to make known his claim to the sheriff in writing, verified by affidavit, and the notice to the plaintiff was required to be in writing.

The present act (R. C., 1865, p. 607, § 28) allows the claim and notice to be verbal.

The act of 1855 then allowed the sheriff to summon a jury to try the right of property, and the verdict of this jury was a comqlete indemnity to the officer, however the issue was

found, except that (p. 743, § 30) if the plaintiff in the execution would give bond with security, the officer was compelled to proceed with the sale. This bond was upon condition, as it now is, "to indemnify him from all damages and costs which he might sustain in consequence of the seizure and sale of the property on which the execution was levied, and also to pay and satisfy, to any person or persons, claiming title to such property, all damages which such person or persons might sustain in consequence of such seizure." And this bond the officer, as now, is required to return with the execution, and the claimant was allowed, as now, to prosecute a suit on such bond in the name of the officer. Further than this, section 32 (p. 744) proceeds to declare, that "after the execution of such bond the claimant shall be barred of his right of action against the officer, unless the obligors in the bond shall have been insolvent at the time such bond was executed."

It will be perceived, that the statute of 1865 differs from that of 1855 in several respects. In the first place no written notice to the sheriff is required, nor any affidavit of the claimant. Again, inquisitions by the officer to try the right of property are entirely dispensed with. Again, the statute of 1865 does not require the sheriff or any other officer peremptorily to sell when a bond is offered, though it may be inferred from the directions to him to file it in the court with the execution, that such was its intent. But chiefly, although the bond is, as in the act of 1855, one to indemnify the sheriff and claimant also, and allows the claimant to sue on it, there is no such provision in the act of 1865 as in the act of 1855, that this bond, provided the securities are good, shall prohibit any action of the claimant against the officers.

It is urged, that the last provision was omitted by mistake or oversight. It may be that it was, or it may be that it was purposely omitted. Very plausible reasons may be given why it should have been omitted intentionally, and reasons equally plausible may suggest themselves why its omission was accidental. But the fact is it was omitted, and there is

no such provision now in the law. That such would not be the law without a positive statutory enactment is clear. An indemnifying bond was common under the common law practice, and the sheriff could take one, and it was no doubt valid. But the only effect of such a bond was to give the sheriff sufficient security, and of this he was the judge, to protect him against the result of suits which claimants might bring against him. The claimant had no concern with it; he could not use it to sue for his benefit, and he was obliged to resort to such actions against the parties to the trespass as the common law afforded him.

The statute offers him another mode of redress, and the statute of 1855 deprives him of all remedy against the officers. That statute is repealed to a large extent, and although the law now still gives him the privilege of the indemnifying bond, it does not take away from him any other rights which existed at common law. The right to sue the sheriff or his deputy, and the plaintiff in the execution, if he ordered or assented to the sale, is a right which always existed, except when positively prohibited by statute; and, although at one time there was a positive prohibition, there is none now. For this court to say now, that there ought to be, or that the Legislature intended there should be, although no such intention is expressed or necessarily implied from the law, would be mere judicial legislation, and it would be further necessary to determine, if the law should be held to be re-enacted, whether the qualification annexed to it in the act of 1855 was or was not also intended.

We think the decision of the Circuit Court on this point was correct. It may further be observed, that the liability of the Mine LaMotte Company is also very clear at common law, apart from the bond given by it, if they assented to the sale or ordered it; and as this company voluntarily made themselves a party to the action, besides giving a bond to the sheriff, the inference is plain, that they did assent to or direct the levy and sale, and were willing to shoulder the responsibility. So that even if the judgment had been erro-

neous, so far as the sheriff and his deputy are concerned, there is no ground for reversing it as to the Mine LaMotte Company, one of the defendants, unless upon a technical ground, of doubtful validity now, that a judgment was an entirety, and, if reversed at all, must be reversed as to all the parties.

The judgment is affirmed, all the Judges concurring.

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JOHN SCROGGS, Appellant, *vs.* JOHN DAUGHERTY, Respondent.

1. *Limitations, statute of—Non-residents—Time when cause of action accrues.*—If, when the cause of action accrues, the party in default is a resident of another State, such non-residence does not prevent the running of the statute of limitations. (W. S., 919, § 16.) [Thomas vs. Black, 22 Mo., 330, affirmed.]

*Appeal from Macon Circuit Court.*

*Ellison & Ellison*, for Appellant.

I. The statute begins to run from the day respondent moved to Missouri. (7 Mo., 241; 15 Mo., 209.)

II. We ask the court to review and revise the decision in 22 Mo., 330.)

*Williams & Overall*, for Respondent.

I. Remedies on contracts are to be regarded and pursued according to the law of the place where the action is instituted; and not by the law of the place where the contract is made. (Bobb vs. Shipley, 1 Mo., 229; Cartmill vs. Hopkins, 2 Mo., 220; King vs. Lane, 7 Mo., 241; Broadhead vs. Noyes, 9 Mo., 56; Dorsey vs. Hardesty, *Id.*, 157; Carson vs. Hunter, 46 Mo., 467; Stephens vs. St. Louis Nat. Bank, 43 Mo., 385; Ang. Limit., (Ed. of 1846,) Chap. 8, and cases there cited; Pearsall vs. Dwight, 2 Mass., 83; Nash vs Tupper, 1 Caines, 402; Ruggles vs. Keeler, 3 Johns., 263; Toulandon vs. Lachenmeyer, 6 Abb., Pr., (N. S.,) 215; S. C., 37 How .Pr., 145; Byrne vs. Crowninshield, 17 Mass., 55.)

VORIES, Judge, delivered the opinion of the court.

This action was brought on a promissory note.

The defendant pleaded payment, and also that the cause of action mentioned in the petition did not accrue within ten years before the commencement of the suit.

The plaintiff replied, that the cause of action had commenced within ten years before the commencement of the suit, and also denied the payment.

The case was tried by the court, when the following facts appeared: At the time of the execution of the note, the 1st day of February, 1859, both plaintiff and defendant resided in Keokuk, in the State of Iowa, that the note was due and payable sixty days after date, that a short time after the execution of the note defendant moved to Warsaw, Illinois, where he resided until 1834, when he moved his residence to Macon county in this State, where he has ever since resided. The suit was commenced on the 28th of September, 1872. There is no pretense, that the defendant either absconded or concealed himself, or that plaintiff was ignorant of the residence of defendant.

The evidence in reference to payment is conflicting, and no point is made on that question.

The court found the issue on the plea of the statute of limitations in favor of the defendant, after making declarations of law on that subject at the request of the defendant.

The plaintiff filed motions for a new trial and in arrest of judgment, which being overruled by the court, the plaintiff excepted, and appealed to this court.

The case was determined in the Circuit Court entirely on the defendant's plea of the statute of limitations. It is conceded, that more than ten years had elapsed after the maturity of the note and before the commencement of the action; but it is contended by the plaintiff, that under our statute the statutory bar only commenced to run from the time that the defendant arrived in this State, and that ten years have not elapsed since that time. To sustain this view of the law, we are referred to the cases of King vs. Lane, 7 Mo., 241, and

Tagart vs. State of Indiana, 15 Mo., 209. The case of King vs. Lane was decided under the statute of 1835, by the seventh section of which it was provided, that "If at the time when any cause of action specified in this article accrues against any person, he be out of this State, such action may be commenced within the times herein respectively limited, after the return of such person to the State, and if after such cause of action shall have accrued, such person depart from, and reside out of, this State, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action." The court held in that case, that it made no difference whether the defendant was a resident of the State and was occasionally absent, or whether he resided altogether out of, the State, and that if the cause of action arose abroad, it was sufficient to save the statute from running until the defendant came into this State, and that the word *return* being used in the statute was not sufficient to limit the saving clause of the statute to residents of the State.

After this construction of the statute by this court, the statute of 1845 was passed, which is identical with the statute now in force. In that statute, the language of the section referred to was changed so as to read as follows: "If at any time, when any cause of action specified in this article accrues against any person who is a resident of this State, he is out of this State, such action may be commenced within the times herein respectively limited after the return of such person into the State, &c." The language of this section, as changed in 1845, is plain, and does not admit of any mis-construction, and was evidently intended to obviate the construction given the previous statute in the case of King vs. Lane. The case of Tagart vs. The State of Indiana was decided after the passage of the act of 1845; but the change made in the statute was not noticed by the attorneys in the case or by the court, but the act of 1835 was referred to and relied on by the court, and the case of King vs. Lane re-affirmed, without any reference to the statute of 1845. After this de-

cision the case of Thomas vs. Black, (22 Mo., 330,) was brought before the court, in the argument of which attention was called to the statute of 1845, and the change made in the language of the seventh section. The court carefully reviewed the case of Tagart vs. Indiana, and the decision in that case was expressly overruled, and it was then held, that the saving clause of the statute only applied to cases of defendants who were residents of the State at the time the cause of action accrued; and we see no room for a different construction of the statute. It follows that the court properly declared the law, and we think that the statute of limitations was well pleaded, and that the judgment properly rendered for the defendant.

The other Judges concurring, the judgment is affirmed.

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STATE OF MISSOURI to the use of ISAAC HUNTER, Adm'r *de bonis non*, of estate of ROBERT B. HILL, deceased, Plaintiff in Error, *vs.* L. W. MAULSBY, *et al.*, Defendants in Error.

1. *Administrators, suits by—Personal judgments—Contracts by administrators and their sureties—Sess. Acts 1865–6, p. 85—Probate Court, jurisdiction of.*—A. as administrator *de bonis non* of B. sued C., the former administrator of D. and his sureties on his official bond, for breaches made of said bond by C. The case was dismissed and judgment rendered against A. personally for costs. *Held*, that this case was not embraced under Sess. Acts 1865–6, p. 85, giving Probate Courts exclusive jurisdiction to hear and determine all suits and other proceedings instituted "against executors and administrators, upon any demand against the estate of their testator or intestate," and that a personal judgment against A. was not proper, inasmuch as he sued in his representative capacity.

*Error to New Madrid Circuit Court.*

*Louis Houck*, for Plaintiff in Error.

I. This is not a "demand against an estate," but a demand in favor of an estate; and hence, this cause does not fall within the words of Sess. Acts, 1865–6, p. 85.

The Circuit Court based its decision upon Dodson vs. Scroggs, 47 Mo., 285, but that case does not go so far.

II. The judgment should have been against the administrator as such. (Ranney vs. Thomas, 45 Mo., 111.)

*R. A. Hatcher*, for Defendants in Error.

Vories, Judge, delivered the opinion of the court.

This action was brought in the New Madrid Circuit Court on the bond of defendant, Maulsby, as administrator of the estate of Robert B. Hill, deceased, and the other defendants as his sureties thereon.

There is no question raised in the record of the case, as to the sufficiency of the petition, provided the court had jurisdiction.

The defendants appeared and filed their motion in the court below to dismiss the suit for the reason, that the Circuit Court of New Madrid County had no jurisdiction of the cause. The motion is as follows:

"Defendants move the court to dismiss this cause for the reason that this court has no jurisdiction of said cause, the jurisdiction being in the Probate Court."

This motion was sustained by the court and final judgment rendered against the plaintiff, which judgment was a personal judgment rendered against Isaac Hunter, for whose use the suit was brought, for the costs.

The only question presented by the parties for the consideration of this court, is whether the Circuit Court has any jurisdiction over the subject matter of the action? The motion to dismiss asserts that the Probate Court of New Madrid County has exclusive jurisdiction over this action.

By the 6th Section of the Act of the General Assembly, establishing Probate Courts in certain counties, in which the County of New Madrid is included, (Session Acts, 1865–6, p. 85,) it is provided among other things, that the Probate Court of New Madrid County shall have exclusive jurisdiction in said County "to hear and determine all disputes and controversies between Masters and their Apprentices; to hear and determine all suits and other proceedings instituted against executors and administrators upon any demand against the

estate of their testator or intestate, subject to appeal in all cases to the Circuit Court in such manner as may be provided by law, etc."

The case under consideration is neither a suit nor proceeding instituted against an executor or administrator upon any demand against the estate of his testator or intestate.

The suit is commenced against living men to recover a personal judgment against them for the breach of a contract entered into by them, and is clearly not within the provisions of the Statute above referred to.

It has been suggested, that the court below relied on the decision in the case of Dodson, Adm., vs. Scroggs, Adm., 47 Mo., 285, as authority in the case. It will be seen by an examination of that case, that it has no similarity to the case now being considered. In that case Scroggs was the administrator of the estates of Scott and Rector, and as such administrator he was sued for the breach of a bond which had been executed by Scott and Rector when living.

The suit in that case was a suit against an administrator to recover a demand against the estates of those he represented, and came exactly within the provisions of the Statute, and it was properly held, that the Circuit Court had no jurisdiction.

It is also insisted by the plaintiff in error, that the court erred in rendering a personal judgment against Hunter for whose use the suit was brought. This objection is also well taken. This suit was brought by Hunter as administrator in his representative capacity; in such case, if judgment was rendered against him, it should have been against him in his representative capacity to be levied of the effects of his intestate. But if there were no other errors in the case, the judgment in that respect might be corrected here. (Ranney, Adm. vs. Thomas, 45 Mo., 111.)

As this case must be remanded for a re-hearing, it will not be improper to remark that the petition in this case is very inartificially drawn, and would perhaps be held bad on demurrer. It is nowhere averred in the petition, except by inference, that defendant Maulsby was appointed administrator

of the estate of Hill, or that he ever qualified as such, and the obligations of the bond sued on are very imperfectly stated; but no objection was made to the petition in the Circuit Court, and we will not notice it further.

The judgment will be reversed and the cause remanded. Judge Sherwood absent; the other Judges concur.

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STATE OF MISSOURI to use of SAMUEL T. DAVIS, Adm. of FRANCIS M. MCCLOUD, Plaintiff in Error, *vs.* L.W. MAULSBY, *et al.*, Defendants in Error.

State to the use of Hunter vs. Maulsby, *ante*, p. 500, affirmed.

*Error to New Madrid Circuit Court.*

*Louis Houck and S. T. Davis*, for Plaintiff in Error. See brief in prior cause.

*Hatcher & Watkins*, for Defendants in Error.

VORIES, Judge, delivered the opinion of the court.

This case is similar in all particulars to the case of "The State to the use of Hunter against Maulsby," decided at the present term, and for the reasons given in that case the judgment of the Circuit Court must be reversed and the cause remanded.

Judge Sherwood absent. The other Judges concurring, the judgment is reversed and the cause remanded.

WILEY JOHNSON, Respondent, *vs.* JOHN HOFFMAN, Appellant.

1. *Landlord and tenant—Croppers on shares—Agreements.*—Where by agreement A. is to cultivate the land of B., and B. is to receive an agreed proportion of the crops, it is a question only determinable by the agreement in each case, whether the relation of landlord and tenant exists, or the parties are croppers on shares.
2. *Forcible entry and detainer—Landlord and tenant—Crops—Tenants in common.*—By written agreement A. leased, let and rented his land for three years to B. to be surrendered up by B. at the end of the term. A. was to furnish all the teams necessary, and the first year all the seeds and farming utensils, and for the rest of the time half the seeds, and B. for his care of the place, &c., was to have one-half of the products of the land. B. went away, leaving his agents in possession, and upon his return, during the continuance of the lease, A. prevented him from taking possession of the land. B. brought an action of forcible entry and detainer against A. *Held*, that by this agreement, B. was the tenant of A., and that they were tenants in common of the crops; that, there being no evidence of abandonment or surrender, B. was entitled to the possession of the land.
3. *Forcible entry and detainer—Recoupment.*—In an action of forcible entry and detainer, the defendant cannot set up a breach of the contract of letting by way of recoupment.

*Appeal from St. Charles Circuit Court.*

*Theodore Bruere and King & McDearmon*, for Appellant.

I. A contract of this kind is not regarded as a lease, but more in the nature of payment for services rendered by a part of the crops raised. In order to constitute a lease, the occupant must have an interest in the soil and freehold. (Maverick vs. Lewis, 3 McCord, 211; Fry vs. Jones, 2 Rawle, 11; Adams vs. Mikesson, 53 Penn. St., 81.)

II. The letting of lands upon shares for a single crop, or for successive crops, is no lease of the land, and the owner alone must bring trespass for breaking the close. (Bradish vs. Schenck, 8 Johns., 151; Putnam vs. Wise, 1 Hill, 234; Chandler vs. Thurston, 10 Pick., 205; Hare vs. Celey, 1 Cro., (Eliz.,) 143; Moulton vs. Robinson, 7 Foster, 550; Aiken vs. Smith, 21 Ver., 172.)

III. If the agreement be for a division of the specific crops, the owner of the land and occupant are to be regarded as ten-

ants in common of the crops, and although called a rent, it is in fact saying, that the occupants shall work the farm for so long, and divide the profits with the owner. (Putnam vs. Wise, 1 Hill, 234; Chandler vs. Thurston, 10 Pick., 205; Dinehart vs. Wilson, 15 Barb., 595; Atwood vs. Ruckman, 21 Ill., 200; Daniels vs. Brown, 34 N. H., 454; Esdon vs. Colburn, 28 Ver., 631.)

IV. Such a lease is not a demise of the premises. (1 Washb. Real Prop., 497; Williams vs. Nolen, 34 Ala., 167; Hurd vs. Darling, 14 Ver., 214; Aiken vs. Smith, 21 Ver., 172; Lowe vs. Miller, 3 Gratt., 205; Ferrall vs. Kent, 4 Gill., 209; Moore vs. Spruill, 13 Ired., 55; Smyth vs. Fankersley, 20 Ala., 212; Tripp vs. Riley, 15 Barb., 333; Otis vs. Thompson, Hill & D., 131; Wall vs. Preston, 25 Cal., 59; Guest vs. Opedyke, 30 N. J. Law, 554; Bernal vs. Hovious, 17 Cal., 546; Piquet vs. Allison, 12 Mich., 330; Currey vs. Davis, 1 Houst., 598; Tanner vs. Hills, 44 Barb., 428.)

*B. B. Kingsbury*, for Respondent.

I. The agreement was to pay a certain part of the crops as rent, and to hold the land with the usual privileges of exclusive enjoyment. (Tayl. Land & Ten., (Ed. 1860,) 15; Jackson vs. Brownell, 1 Johns., 267.)

II. This was not the case of working land for a share in the crop. The lease gave respondent an absolute right of possession for three years.

III. The cases cited by appellant are believed to be all of them on questions arising as to ownership of crops.

IV. The fact of joint tenancy in crop does not rebut the fact of relation of landlord and tenant. (Ferrall vs. Kent, 4 Gill., 209; Walls vs. Preston, 25 Cal., 59.)

V. The evidence by way of recoupment or set-off was properly rejected. (Robinson vs. Walker, 50 Mo., 19.)

Adams, Judge, delivered the opinion of the court.

This was an action of forcible detainer for a farm situated in St. Charles county.

The suit originated in St. Charles county, and was taken by

change of venue to Warren county, and resulted in a verdict and judgment for the plaintiff, from which the defendant has appealed to this court.

The plaintiff claimed possession of the farm by virtue of a written agreement entered into between him and the defendant. He had gone into the possession under this agreement, or rather was already there at the date of the agreement, and cultivated the farm about two years. His family did not reside on the farm, but he had possession of one of the tenements, in which he kept a woman and a boy some thirteen years old. In the Fall of 1869, he removed with his family, leaving the woman and boy in possession of the tenement aforesaid, and in February, 1870, he went back to work on the farm as he had previously done, when the defendant forcibly prevented him from taking possession of the farm; and thereupon the plaintiff commenced this action for the possession.

The material question is, whether the agreement between the parties was a lease, whereby the possession of the farm was transferred to the plaintiff, or simply an agreement by which the plaintiff was hired to cultivate the farm on shares, the defendant all the time holding the possession exclusively for himself. The agreement referred to reads as follows: "This agreement, made and entered into this 20th day of June, eighteen hundred and sixty eight, by and between John Hoffman, Senior, party of the first part, and Wiley Johnson, party of the second part, both of the county of St. Charles, State of Missouri: Witnesseth, that the said John Hoffman, Sr., party of the first part, by these presents leases, rents and lets unto, said Wiley Johnson, party of the second part, for the term of three years, his farm known as the John Hoffman farm, about one mile south of Cottleville in the county of St. Charles, State of Missouri, commencing on the first day of March, eighteen hundred and sixty eight, and ending on the first day of March, eighteen hundred and seventy one, at the following terms and rates: First—The said Wiley Johnson, party of the second part, hereby agrees and binds himself to keep said place and fences in good farm-like order and repair,

for one-half of all grains, fruits and vegetables, and in all whatever may or will be raised on said farm for said three years. Second—Said John Hoffman, Sr., party of the first part, hereby agrees and binds himself to find all the necessary teams to cultivate and work said farm, and also to find the first year all the seeds and farming utensils, and for the balance of the two years, to find one-half of all seeds that may be raised on said farm. Third—Said John Hoffman further agrees and binds himself to pay one-half of all the dredging expenses, which may accrue from dredging of all grains sowed on said farm. Fourth—Said Wiley Johnson on his part further agrees to give up possession of said place and all the buildings thereupon, from the first day of March, eighteen hundred and seventy-one, at the request of said Hoffman. In testimony whereof, we have hereunto set our hands and affixed our seals, the day and year first above written.

JOHN HOFFMAN,
his
WILEY X JOHNSON
mark

Attested by Albert Demor."

This agreement, although dated in June, 1868, contemplates a letting from the first day of the previous March. The parties may have had the same verbal understanding between themselves which was not reduced to writing till June, 1868. Contracts of this character, although unknown in England, are frequent in the United States. The authorities, however, are conflicting in the several States, as to whether they create the relation of landlord and tenant, or simply make them croppers on the shares. In my judgment no definite rule can be laid down on this subject. Each case must be determined by the words of the written agreement between the parties. It is obvious from the language of this agreement, that the plaintiff was to have the possession of the farm, for the length of time indicated therein. The crops however, were to be divided between the parties. They were therefore tenants in common of the products of the farm, with the

possession of the land in the plaintiff as tenant of the defendant as his landlord. This seems to be the plain meaning of the agreement. The words are, that the defendant "leases, rents and lets" to the plaintiff his farm, &c., and at the end of the time the plaintiff is to "give up possession of said place and all the buildings, &c.," to the defendant. How could the plaintiff "give up" or surrender possession, if he was not in possession; and how could the defendant receive from the plaintiff possession, if he was already in the exclusive possession?

If the relation of landlord and tenant could be created at all under such a lease, it existed here. (See 1 Washb. Real Prop., 497; Moulton vs. Robinson, 7 Foster, (27 N. H.,) 550.) The plaintiff by this agreement was properly a tenant, having as against the defendant his landlord, as well as others, the possession of the land, and the rights growing out of that relation. The rights of the defendant in the crops, as tenant in common, were not inconsistent with their relations as landlord and tenant. Whether plaintiff was entitled to the possession of the place or not, the defendant was entitled to the possession of his share of the crops.

There appears to be nothing else in the record worthy of consideration. The evidence did not show an abandonment or surrender of the place by the plaintiff to the defendant.

From this record we cannot see, whether the questions propounded to the plaintiff on the subject of abandonment should have been answered or not. The bill of exceptions does not show what the answer would have been, or that it would have been material.

There is nothing in the point, that the defendant was not allowed to set up damages to himself growing out of the contract by way of recoupment. That cannot be done in actions of forcible entry and detainer.

The defendant still has his remedy for such damages, if any, by an action on the contract.

Let the judgment be affirmed. The other Judges concur.

## Lydia M. Loyd, *et al.*, Respondents, *vs.* The Hannibal & St. Joseph Railroad Company, Appellant.

1. *Damages—Railroads—Contributory negligence—Allegations as to.*—In a suit for damages against a railroad company the petition need not allege, that plaintiff was at the time exercising due care, and not guilty of negligence contributing to the injuries received.
2. *Damages—Railroads—Jumping from train while in motion.*—In a suit against a railroad company to recover damages for injuries sustained by plaintiff in getting from the platform of the car upon that of the depot, the evidence showed, that the train stopped at the station only a minute; that during that time plaintiff's little child alighted; that plaintiff followed without delay, but after the train was in motion, and received her injuries in consequence of jumping from the train. *Held*, that plaintiff would not be barred of recovery by the fact, that she jumped from the train while in motion.
3. *Damages—Excessive—Remittitur, etc.*—Where the sum recovered as damages was reduced by remittitur to an amount satisfactory to the Judge who tried the cause, this court will not interfere.
4. *Practice, civil—Jury—Arguments before—Statements by counsel, etc.*—An advocate ought not to be allowed to make himself a witness and to state facts not in evidence touching the case under discussion. And it is the duty of the judge to check such statements.
5. *Practice, civil—New trial, motion for—Address to jury—Statements not in evidence made in, etc.*—Where the trial judge overruled a motion for new trial based upon the affidavit of a bystander, setting forth certain statements not in evidence made by counsel in addressing the jury, ordinarily the Supreme Court will not interfere. The court who heard the speech is the proper tribunal to judge of its character and effect on the jury.
6. *Damages, suit for—Surgeons called in to ascertain extent of injuries.*—The proposal of counsel in a damage suit, to have surgeons called in during the progress of the trial to examine plaintiff as to the extent of his injuries, is unknown to the law, and the court has no power to enforce such an order.

*Appeal from Monroe Circuit Court.*

*James Carr*, for Appellant.

I. There is no allegation in the petition that the respondent, Lydia M. Loyd, exercised proper care in attempting to alight from the coach in which she had been riding. This is an affirmative allegation, without which she was not entitled to recover. (Chicago, B. & Q. R. R. vs. Hazzard, 26 Ill., 373; Evansville R. R. Co. vs. Dexter, 24 Ind., 411; Indianapolis, P. & C. R. R. Co. vs. Keely's Admr. 23 Ind., 133; Gahagan, Admx. vs. Boston & Lowell R. R. Co., 1 Allen, 187.)

II. The respondent's evidence did not show that she exercised proper care in alighting from the coach. She stepped out from the train after it had moved half a car length. (Ohio & Mississippi R. R. Co. vs. Schiebe, 44 Ill., 460; Railroad Co. vs. Aspell, 23 Penn. St., 147; Damont vs. Carrollton R. R. Co., 9 La. An., 441; Lucas, Admr. vs. Taunton & New Bedford R. R. Co., 6 Gray, 64; Gavett vs. Manchester & Lawrenceburg R. R. Co., 16 Gray, 501; Gilman vs. Deerfield, 15 Gray, 577; Siner vs. Great Western Railway Co., 3 Exch. (Law) R., 150; Gahagan, Admr. vs. Boston & Lowell R. R. Co., 1 Allen, 187; Adams vs. Carlisle, 21 Pick. 146; Murphy vs. Deane, 101 Mass., 455; Wilds vs. Hudson River R. R. Co., 24 N. Y., 430.)

III. The court below should have set aside the verdict of the jury, on account of the misbehavoir of the respondent, Lydia M. Loyd, towards Miss Alice B. Johnson, whilst she was testifying for appellant. Miss Johnson had never been in court or testified before. She was young, modest, and easily embarrassed. The respondent's interruption did embarass her so much that she was unable to testify to all the facts material to the case, to which she could and would have testified to if she had not been interrupted. Her affidavit made since the trial shows this very clearly.

IV. The counsel for the respondents, Thomas L. Anderson, misbehaved in the closing argument to the jury. He made statements of facts and lugged in rumors in regard to other causes and matters in which the appellant was concerned, not relevant to the case, and not in evidence, which were not true, and which misled and prejudiced the jury.

During the argument by the respondents' counsel, the appellant's counsel requested the court to require the respondents' counsel to confine himself to the evidence. The court declined to interfere. (Tucker vs. Henniker, 41 N. H., 317; Mitchum vs. State of Georgia, 11 Ga., 629; Berry vs. State of Georgia, 10 Ga., 521.)

V. The court erred in not making the order for the examination of Mrs. Loyd, after she had refused to be examined.

No medical man had testified in regard to the nature and extent of her injury at the time of the trial. There was no evidence before the jury as to her condition then.

There is certainly as much necessity for an examination in this case, or this kind of a case, as there was for the writ *de ventre inspiciendo* at common law, that a widow, claiming to be *enciente* by her deceased husband, should be viewed by twelve knights, and searched by twelve women, in the presence of the twelve knights, *et ad tractandum per ubera, et ventrem inspiciendum.* (Willoughby's case, 1 Croke, 566; 3 Black., 361; 2 Tidd's Pr., 795; 1 Dunlap's Pr., 601.)

*George H. Shields*, for Respondents, presented the following, among other points:

I. The novel proposition, that the court should require the plaintiff to submit to examination by two physicians of defendant's choosing, was properly overruled. There was no ground in law or reason for such a proposition and it could not be enforced.

II. Another point relied on to reverse is, that counsel for plaintiffs, in the closing argument to the jury, "lugged in rumors in regard to other cases and matters in which defendant was concerned not relevant to this case, and not in evidence, which were not true and which misled and prejudiced the jury."

The court properly overruled the objection.

If *ex parte* affidavits of this kind made by a single witness would set aside a verdict, no verdict would ever be allowed to stand, and the jury system had better be abolished. The argument and conduct of the case is submitted to the *nisi prius* judge, and in matters of this sort his power is discretionary. (Hilliard's New Trials, 225, § 40; Hilliard's New Trials, 225, § 40; 227, §§ 45, 48, 50; Cobb vs. State, 27 Ga., 648; 2 Waterman on New Trials, 47 and cases cited.)

III. Another point relied on was "excessive damages." Courts will not set aside a verdict on the ground of excessive damages, unless they are outrageously so, or there is reason to believe that there was passion, or prejudice, or corruption,

on the part of the jury. (Hogg vs. Emerson, 11 How., 587; Wheaton vs. N. B. R. R. Co., 36 Cal., 590; Boyce vs. Cal. Stage Co., 25 Cal., 460; Russ vs. War Eagle, 14 Iowa, 363.)

The plaintiff remitted $1,500 of the verdict, leaving only $2,500, which is a reasonable sum for such injuries as plaintiff received.

IV. Appellant contends, that the petition does not aver, that plaintiff was in the "exercise of due care," nor negative the idea of plaintiff's own negligence. This is not necessary. (Thompson vs. N. M. R. R. Co., 51 Mo., 190; Shearm. on Neg., 46; 11 Wis., 160; 5 Barb., 337; 18 N. Y., 248; 1 Hilton, 213; 5 Dutch., 548; 37 Ver., 50.)

NAPTON, Judge, delivered the opinion of the court.

This suit was to recover damages sustained by Mrs. Loyd in getting off the cars at Monroe City, where it is alleged the cars of defendant did not stop long enough to enable her and her child to get off with safety, and where, in her attempt to do so, she was thrown upon the platform of the station and injured, to her damage in the sum of 5,000 dollars.

It appears from the evidence; that the cars did not stop at Monroe City more than a minute; that when the signal was given, the plaintiff started with her child, and some bundles, for the door, and meeting some persons coming on the cars, could not immediately get down the steps, and before she could get off, the cars were in motion, and she jumped off and fell on the depot platform and was injured.

There was testimony in relation to the amount of injury Mrs. Loyd received, and the defendant moved that two respectable physicians and surgeons should examine her condition, but the court refused such examination.

The court instructed the jury, that if the plaintiff's child stepped from the train before it was in motion, and the plaintiff stepped off while it was in motion, but without delay, the plaintiff was entitled to recover.

The court also instructed the jury, that if time enough was allowed for the plaintiff to get off the cars, when the train arrived at Monroe City, the defendant was not liable, and that

R. R. passengers, knowing that the train was in motion, were not entitled to recover for damages, if the train stopped a reasonable time.

The jury found a verdict for the plaintiff for $4,000, which was reduced on the suggestion of the judge, who tried the cause, to $2,500.

There was a motion for a new trial, assigning the usual reasons, and the additional ones that the damages were excessive, and that the plaintiff interrupted and embarrassed one of defendant's witnesses, so that the witness did not tell all she knew about the matter, and because the counsel for the plaintiff did not state all his points in his opening argument, and in his closing address made statements of facts outside of the evidence, which tended to mislead and prejudice the jury.

And in support of these latter grounds, affidavits were filed, on the part of the witness who was interrupted, and in regard to the details of the speech made by plaintiff's attorney.

There was also a motion in arrest of judgment, because the petition did not state facts sufficient to constitute a cause of action—there being no allegation of proper care and diligence on the part of plaintiff to avoid the injury received, and negativing any contributory negligence on her part.

Both these motions were overruled.

As to the point that the petition failed to aver the exercise of due care on the part of plaintiff, and to negative the existence of any negligence contributory to the injury received, the case of Thompson vs. N. M. R. R. Co., 51 Mo., 190, upon an examination of the authorities, decides that such allegations are unnecessary.

The instructions given presented the law fairly to the jury, and all the law applicable to the matter in controversy; those refused were mere abstractions, and had no application to the facts in evidence. Whilst it may be the law, that a passenger, who jumps from a train when in motion, takes the risk of injury to life or limb, it does not follow that the plaintiff in this case could be expected, whilst standing on the steps of the car, and after her child three years old had been lifted out,

to have the presence of mind to deliberate on the propriety of following her child although the train immediately commenced to move, nor had she time to reflect on the danger of a straightforward movement at right angles to the train, instead of inclining in the direction the train was moving.

The fact appears in evidence, that the train was behind time and that it did not stop a minute. All the witnesses compute the time by seconds.

The verdict of the jury for the plaintiff, on the facts and under the instructions, was manifestly right.

The amount of damages, as it originally stood, was large, perhaps greater than the injury sustained would seem to authorize; but as this sum was by a remittitur reduced to a sum satisfactory to the judge who tried the case, there is no ground for the interference of this court on that point.

In relation to the affidavit of the bystander concerning the closing argument of the counsel for the plaintiff, it is to be observed, that an advocate, however unrestricted he may and ought to be, in the use of all the forms of rhetoric, such as invective, satire, ridicule or humor, and every variety of illustration drawn from the facts in evidence or from facts hypothetically assumed, ought not to be allowed to make himself a witness, and state facts within his own knowledge, touching the case under discussion.

It is no doubt the duty of the judge, who presides at the trial, to prevent such departures from the proper and legitimate sphere of the counsel; but the line of discrimination between legitimate illustration and comment, and the introduction of facts not in evidence, and having no bearing on the question at issue, is not always clear, since it is always in the power of rhetorical ingenuity and fancy to put facts not in evidence hypothetically to the jury, and by comments on such supposed facts do as much harm to the adverse party through the medium of innendoes or insinuation, as by plain and unequivocal assertions of their truth.

All these difficulties, however, were remediable under the

old system of charging juries at the close of the case. That power is not now given to the courts, for reasons doubtless satisfactory to the Legislature. The court cannot sum up the evidence, or comment on it, or draw the attention of the jury to the real points in issue, in any other way than by written instructions prepared and given to the jury before the arguments of counsel.

To interfere with the latter, is therefore a delicate matter without infringing on the province assigned by the Legislature to the courts.

Undoubtedly, if this court is to assume as correct the version of the closing speech made by the counsel for plaintiff, portions of it are irregular, and should not have been allowed. But the judge who presided at the trial heard this speech as well as the bystander who reports it, and overruled the motion for a new trial. It may be because the speech was not correctly represented; or it may be because the court was satisfied that the verdict was right, notwithstanding the departure of the counsel from the strict line of his duty as an advocate. Of this that court is certainly better qualified to judge than this court can be, and in ordinary circumstances must necessarily be the sole judge. If this court should undertake to set aside verdicts whenever a bystander should report the argument or address of counsel, and assume the report to be correct, and as reported it appears to us to have gone further than professional duty to his client or the rules of law required, very few verdicts would stand, and jury trials would be an unnecessary and useless expense to suitors.

The same observation will apply to the affidavit of the witness, Alice Johnson, concerning interruptions *sotto voce* made by the plaintiff. The judge who presided heard the evidence of this witness and so did the jury and counsel on either side. The judge could see whether the witness was embarrassed during her testimony. As the judge refused a new trial and certifies the verdict here, we see nothing in this ground disturbing it.

The proposal to the court to call in two surgeons, and have

the plaintiff examined during the progress of the trial as to the extent of her injuries, is unknown to our practice and to the law. There was abundant evidence on this subject on both sides: any opinion of physicians or surgeons at that time would have only been cumulative evidence at best, and the court had no power to enforce such an order.

Judgment affirmed. The other Judges concur

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SALATHIEL B. AYRES, Plaintiff in Error, *vs.* JOHN M. MILROY, Defendant in Error.

1. *Bills and notes—Surety—Agreement as to co-surety—Liability of surety, etc.*—Where one becomes surety on a non-negotiable promissory note on the express condition that another shall be procured as co-surety, and the latter fails to join, the surety will not be liable although the note is in the hands of a holder having no notice of the agreement. As to the surety, while the condition remains unperformed the instrument is merely an escrow and there is no delivery.

PER NAPTON, J., SHERWOOD, J., CONCURRING.

2. *Bills and notes—Surety—Agreement to obtain co-surety—Notice—Maker, agent of surety.*—Although a surety upon a note is induced to sign upon the promise of the maker, that a co-surety shall be joined, yet if nothing on the face of the paper imparts notice to the holder or puts him on inquiry as to such agreement, no fault attaches to the latter, and the surety must run the risk of the fraud of his own agent.

*Error to Louisiana Court of Common Pleas.*

*Minor & Foster with Anderson & Niel*, for Plaintiff in Error.

I. If defendant signed the note as surety at the request of the maker and delivered it to him on the condition that he should obtain Dyer's name, and the maker, without securing it, delivered the note to the payee, who had received no notice of the condition upon which defendant signed the note, the latter is liable on the note. (Farrell vs. Hunter, 21 Mo., 436.)

II. As the note was absolute on its face when plaintiff received it, parol testimony was inadmissible to vary or contra-

dict it. (Smith's Adm'r vs. Thomas, 29 Mo., 307; Blackburn vs. Harrison, 37 Mo., 303.)

*Fagg & Dyer*, for Defendant in Error.

WAGNER, Judge, delivered the opinion of the court.

This was an action commenced upon a non-negotiable promissory note against the defendant.

The defense set up in the answer was, that Milroy, the defendant, signed the note as surety for one Jones upon the express understanding, that Jones was also to procure the signature of D. P. Dyer, as an additional security, and, that if the name of Dyer was not obtained, then he was not bound; that Jones did not get Dyer to sign the note, and that plaintiff had full notice of this condition before he received the note.

It seems that Jones took the note, and, without getting Dyer to sign it, he delivered the same to plaintiff. The court below found for the defendant, but its verdict appears to have been based on the fact, that the plaintiff had notice of the condition upon which defendant signed the note. It is now contended, that there was no evidence adduced to show that plaintiff had any such notice, and if there was no such notice, then the verdict and judgment are against the law.

An examination of the record forces upon my mind the conclusion, that there was, in fact, nothing to bring notice home to the plaintiff of the agreement upon which the note was signed by the defendant. But it is conceded throughout the whole case, that there was such an understanding, and that defendant signed the note as surety upon the express condition, that Dyer was also to sign it, and that Jones was not to deliver it to the payee till Dyer's signature was obtained.

The question then is, whether the defendant is liable, where the condition was not complied with, though the plaintiff had no notice of the fact when he took the note.

In the case of negotiable or commercial paper, it is very clear that the defense would not be held good.

In a suit upon a note of that character it was expressly ad-

judged by this court in the Bank, etc. vs. Phillips, 17 Mo., 29, that it was no defense for an indorser who was sued upon a note, that he indorsed it upon the express condition, that it should also be indorsed by another person, when it did not appear that the plaintiff knew of the condition.

In making this line of defense there is a clear distinction recognized between bonds or other instruments that are not negotiable, and those which are negotiable.

The question here presented has often been before the courts, and the almost universal holding has been, that where a bond or other instrument for the payment of money is executed by a surety on the condition that another person shall also sign it as surety, and that if not so signed, then the principal obligor shall not deliver it, and the obligor does deliver it in violation of this agreement, then the surety who signed will not be bound.

In the case of State vs. Sandusky, 46 Mo., 377, we quoted approvingly the rule laid down by the Supreme Court of Mass., in Cutter vs. Whittemore, 10 Mass., 442, where Jackson, J., speaking for the court, said: "If there had been any agreement or condition at the time, that it should not be delivered as their deed unless a third person named as obligor should also execute it, this would show that it was only delivered as an escrow."

In Linn County vs. Farris, 52 Mo., 75, the principal procured the signature of a surety on the bond, the surety signing it on condition, that another person should likewise be procured to it, but the other person's signature was not procured and his name was forged on the bond, and the principal then delivered it. In an action on the bond it was decided there was no delivery as to the surety, and that the bond was void as to him.

In the case of Lovett vs. Adams. 3 Wend., 380, the defense was, that the bond had never been delivered by the obligors, and the fact was offered to be proved by a co-obligor. The witness was rejected. In delivering the opinion of court, Savage, C. J., said: If a bond be signed and put into the

hands of the obligee or a third person, on the condition that it shall become obligatory upon the performance of some act by the obligee or any other person, the paper signed does not become the bond of the party signing the same, until the condition precedent be performed. Until then there is no tract."

In Bronson vs. Noyes, 7 Wend., 188, a bond was given to the sheriff on an arrest. The sheriff said to the party signing, "sign the bond and he will get some other person to sign with you or get other bail in the morning." It was said by the court (Nelson, J.,) "If it was the agreement of the parties at the time it was put into the hands of the officer, that it was not to be delivered to take effect until additional bail was procured, then, whatever might be the intention of the defendant, the bond would be inoperative and have no legal existence."

In Leaf vs. Gibbs, 4 Car. & P., 466, it was decided, that when a person signs a promissory note on a representation that others are to join, and one afterwards refuses to sign, the payees cannot recover in an action on the note against the person who signed it, unless the jury are satisfied that such person, knowing the facts and being aware of his rights, had consented to waive his objection.

Ch. J. Tindal, in summing up the case to the jury, uses this language: "It seems from the evidence of the plaintiff's witnesses, that the defendant was told that his mother was to join, and therefore the obtaining of her signature was a condition,which, if not carried into execution,would justify the defendant in withdrawing, and if matters have not been altered since the signing of the note, the defendant will not be liable."

There was a verdict for defendant.

In Perry vs. Patterson, 5 Humph., 133, it was held, that where a bill was delivered to the creditor by an obligor as surety, upon condition that another should sign as co-surety, it was delivered as an escrow, and was not obligatory unless the condition was complied with, or unless he agreed that it should be obligatory upon him after his knowledge of the refusal of the other to sign as co-surety.

It was also further held, that when delivered as an escrow by a surety to the principal obligor, and by the latter to the creditor absolutely and without condition, the ignorance of the creditor does not discharge the condition and constitute the delivery a valid delivery. It was the business of the creditor to have informed himself of the facts connected with the delivery.

The court observes, "the law upon this point is settled beyond controversy, and needs at this day no investigation." So in Alabama (Bibb vs. Reid, 3 Ala., 88) it was decided, that a bond may be delivered conditionally to a co-obligor, and will not be operative as a deed of the party until the condition is performed.

The court speaking through Ormond, J., who wrote the opinion, say: "We are satisfied that on principle there can be difference between a conditional delivery to a stranger or a co-obligor; that in either case the deed cannot be operative until the condition is performed, and such is clearly the weight of authority at the present day."

In the State Bank at Trenton, vs. Evans, 3 Green, (N. J.) 155, the subscribing witness to a bond testified, that at the time of its execution by the defendant he said: "This bond is not to be delivered till signed by all the persons named therein;" and upon inspection of the bond it appeared, that one of the obligors had not signed it. It was held, that the bond could not be received in evidence. It was also decided in the same case, that whether a party says, "I deliver this writing as my deed in the confidence that you will not deliver it to the grantee until a certain condition be performed," or whether he says, "I deliver it to you as an escrow, to take effect as my deed upon a certain matter being done," it is in either case an escrow, and will be inoperative in the hands of the party, by whatever means he may get possession of the instrument, until the condition is performed. It is the performance of the condition, and not the second delivery, that gives it vitality and existence as a deed. In this case the bond was delivered to the obligor, for whose benefit it was

signed by the defendants. The same condition was made a part of the execution as in the case under consideration, and it was not to be used until signed by all,who, by the arrangement,were to become parties to it. Ch. J. Hornblower, who delivered the opinion of the court, after reviewing many of the authorities, remarks: "It is evident that the word stranger is used by Lord Coke in opposition to the party to whom the deed is made. A delivery to a co-obligor without words would give no more effect to the instrument than delivery to a stranger with words." Ryerson, J. also delivered an opinion, and argued that there was no delivery; as delivery implied, that the party,who had sealed, had given up control of the writing to, and for the use of, the other party. He said "the intention to deliver,which is the essence of the transaction, is wanting. The intention to deliver this writing was never formed, but one quite different." * * *

A mere parting with the actual possession of a writing is very different from a legal delivery,which is to give it operation as a deed.

Delivery is necessary to the complete execution of a promissory note, and if the payee obtain possession thereof by fraud or any unauthorized act, he cannot maintain an action on it. (Carter vs. McClintock, 29 Mo., 464.) There must not only be a delivery, but it must be with an intention to deliver, and by one who has a right to deliver.

In Pepper vs. The State, 22 Ind., 399, it is held, that where a bond is presented by the principal in it to several persons, and their signatures as sureties for him are solicited by him, and he represents to them severally, that before its delivery he will procure the signatures of a certain number of other persons as sureties, or of certain named persons, and some of them are induced by such representations to sign it, and others sign it upon condition that such other signatures shall be procured, and such other signatures are not procured, these persons who signed upon condition may show these facts in defense to an action on the bond.

So in the case of The People vs. Bostwick, 43 Barb., 9,

where a bond for the payment of money was executed by several persons at the same time, as sureties, upon the representation that another person would sign it as co-security, and with the understanding that one of the obligors was to take the bond, but was not to deliver or use it, until after it was signed by the other person; it appeared, that some of the sureties would not have signed the bond, except on the condition that the additional surety should be obtained, and that they did not otherwise authorize its delivery. The obligor, to whom the bond was given, delivered the same to the obligee without having procured the signature of the other designated surety. The court held, that there was no valid delivery of the bond—that it was incomplete, and the transaction was not consummated—and that the condition, on which the instrument was executed, not having been performed, the obligors were not liable.

This last case was affirmed on appeal in 32 N. Y. 445, and Denio J. there said, that "the principle, that where one of two innocent parties must suffer, he, who has put it in the power of a third person to commit the fraud, must sustain the loss, is not one of universal application, if the language be taken in a popular sense. In such cases the one, who claims the benefit of the rule, must not himself be guilty of negligence."

The cases just cited from 22 Ind. and 43 Barb. contain exhaustive and elaborate reviews of the authorities on the question, and they will be found overwhelmingly to sustain the views herein presented. Indeed, with the exception of Millett vs. Parker, 2 Met. Ky., 608, I have found no direct case to the contrary. The same doctrine seems to be settled in the Supreme Court of the United States. In Pawling vs. The United States, 4 Cranch., 219, it was held, that a bond may be delivered as an escrow by the surety to the principal obligor, and if one of the obligors at the time of executing the bond, in the presence of the obligors, say, "we acknowledge the instrument, but others are to sign it," this is evidence from which the jury may infer a delivery as an escrow by all the obligors who are present.

In the United States vs. Leffler, 11 Pet., 86, in an action of debt upon a joint and several bond, the principal had confessed a judgment for the amount. The United States proceeded against the other defendants, and upon the trial the principal in the bond, having been released by his co-obligors, was offered by the defendants, and admitted by the court, as a witness, to prove that one of the co-obligors had executed the bond on condition that others would execute it, which had not been done. The Circuit Court admitted the evidence, and it was held on appeal, that there was no error in the decision on the trial.

The case directly involved the principle now presented for consideration and is an authority in favor of the doctrine that such a defense as is interposed in the present case is available.

The plaintiff here occupies the position of taking a security, to which the party giving it had no title.

The defendant was merely a surety, and derived no benefit from the contract. If the rule of principal and agent applied, then the defendant would only be liable for such acts as he authorized.

The power conferred in this case was conditional, and the condition not being performed upon which its exercise depended, and, it being entirely unauthorized, the principal would not be bound. The rule is settled, that an agent cannot bind a party contrary to his instructions, and a special authority must be strictly pursued.

In the case at bar, there was no delivery of the note, upon which this action was brought, by the surety who now defends. It was simply left with Jones, on condition that he should not use it for the purposes intended until after he had obtained the signature of another party. It was therefore incomplete, and the transaction was not consummated. Under such circumstances, both upon principle and authority, the surety who signed the note is not liable until the condition is fulfilled.

I am of the opinion therefore that the judgment should be

affirmed. The other Judges concur, except Judge Sherwood, who is absent.

Separate opinion of Judge NAPTON.

I do not concur in this opinion, though there is authority tending to support the conclusion reached. If the payee has knowledge of the arrangement for other sureties, or if there are other circumstances connected with the execution of the note to put him on inquiry, the rule announced may be correct, and I think is; but where there is nothing on the face of the paper indicating that other sureties were expected to become parties to the instrument, and no fact brought to the knowledge of the payee or obligee, before he accepts the instrument, calculated to put him on his guard in respect to that point, and which would naturally have led a prudent man, interested in the opposite direction, to make the inquiry before accepting the security, the fault cannot be said to rest to any extent on the obligee or payee. (Ins. Co. vs. Brooks, 12 Am. Law Reg., 399.) And therefore the surety must run the risk of the fraud of his own agent. Most of the cases cited are upon official bonds, or bonds for the payment of money, and the doctrine of special agency is relied on to make such conditional delivery by the surety to his principal, as merely making the deed an escrow; but this doctrine would manifestly apply as well to negotiable paper, and it has never been pretended, that negotiable paper is subject to such hidden defenses. I concur in affirming the judgment. Judge Sherwood concurs with me.

JAMES W. HUDSON, Respondent, *vs.* ST. LOUIS, KANSAS CITY AND NORTHERN RAILWAY CO., Appellant.

1. *Justices' courts—Cattle, damages to, by railroads—Jurisdiction.*—Justices of the peace have jurisdiction over suits against railroads for killing, maiming, &c. cattle, &c. in their respective townships, without regard to the value of the animals, or the amount of damages claimed. (W. S., 808, § 3.)
2. *Railroads—Suits against, how brought—Injuries to individuals—Statutes, construction of.*—The statute concerning suits against railroads, providing that the penalties therein mentioned shall be sued for in the name of the State (W. S. 309, § 36; 310, 311, §§ 38, 42, 43,) so far as the rights of individuals to recover for damages received are concerned, is a remedial and not a penal statute, and, at most, only can be construed to give an additional method of prosecuting such suits.
3. *Practice, civil—Trials—Jurors, competency of—Challenge.*—Jurors were asked, "whether, if the evidence were evenly balanced between plaintiff, an individual, and defendant, a corporation, which way would you incline to find?" They answered, that they would incline to find for the plaintiff. They were then challenged for cause. The court then asked them, if they thought they could try the case fairly, and without prejudice or bias; to which they replied affirmatively. *Held*, that, taking both answers together, the jurors were not incompetent, that jurors are not to be expected to know the rules of law about the weight of evidence, until instructed thereupon by the court.
4. *Railroads—Summons—Service on depot-agent.*—A summons against a railroad is properly served on its depot-agent by the constable.
5. *Practice, civil—Trials—Instructions—Questions of law.*—Instructions submitting questions of law to the jury ought not to be given, unless other instructions are also given explaining those questions.
6. *Practice, civil—Trials—Corporations, suits against—Existence of, proof of—Justices' courts.*—It is not necessary, on a trial in the Circuit Court of a cause originally brought before a justice against a corporation, for the plaintiff to prove defendant's corporate existence, when defendant has appeared and defended as a corporation, has executed bonds filed in the cause authenticated by its corporate seal, and in every way, that it could be done, recognized its corporate existence, and tried and defended the case on the merits to final judgment in its corporate name.

*Appeal from Warren Circuit Court.*

*John M. Woodson*, for Appellant.

I. The double damage liability imposed by section 43, is a penalty recoverable only in the name of the State of Missouri. (W. S., 310, §§ 42, 43.)

The peculiar language of this section must be observed. It provides, after declaring that railroad corporations shall erect and maintain fences, &c., that, "Until such fences, open-

ings and gates or bars, farm crossings or cattle guards, shall be duly made and maintained, such corporations shall be liable in double the amount for all damages which shall be done, &c., occasioned in either case by a failure to construct or maintain such fences or cattle guards."

It is nowhere provided, that such double amount shall be; recoverable by the owner of any animal killed or injured, &c. but by taking sections 42 and 43, and construing them together, it will be seen, if such double liability is a penalty, that it was unnecessary to provide a means for the recovery thereof in such section 43, as such remedy or means is provided in section 42. Again, a full and complete remedy is given to the owner of any animal killed or injured, &c., in W. S., 520, § 5.

Construing the two statutes as consistent statutes, and each defining, as respondent claims, a right of recovery in the owner, we conclude; that section 5 defines the owner's right of recovery to the extent of the value of his property; and section 43, being a general police regulation, enacted for the protection of the public, defines the rights of the public, the people, the State of Missouri.

This Statute, (W. S., Chap. 37,) would be unconstitutional, were it not that a penalty is imposed for a failure to fence, which the legislature may dispose of in its discretion. (Trice vs. Han. & St. J. R. R., 49 Mo., 438.) Being a penal statute, all of its provisions should be strictly construed, and if a means of enforcement is provided by any section of such statute, it should be pursued, and no remedy not specifically provided should be implied.

Section 42, (W. S., 310,) says, that the penalties may be sued for in the name of the State. This word so used, in regard to bringing the suit in the name of the State and before a justice of the peace, ought to be considered as imperative, and as used in the sense of the word "shall." (State vs. Hannibal & St. Joseph R. R. Co, 51 Mo., 532.) To conclude this point, the provisions of section 43 are designed to punish the company for a neglect of duty, viz: A

failure to fence, and a suit to recover the penalty, shall be brought in the name of the State. (Smith vs. Lockwood, 13 Barb., 209; McKeon vs. Caherty, 3 Wend., 494; Simmons vs. Borland, 10 Johns., 467; Allen vs. Ehle, 7 Cow., 496; Stafford vs. Ingersol, 3 Hill, 38; Rennick vs. Morris, 7 Hill, 575; Cecil vs. Pac. R. R., 47 Mo., 246; Riddick vs. Governor, 1 Mo., 147; W. S., 310, §§ 42, 43; Millar vs. Taylor, 4 Burr., 2305; Donaldson vs. Beckett, 7 Bro. P. C., 88; Dudley vs. Mayhew, 3 N. Y., 9; Lindell's Admr. vs. Han. & St. Jo. R. R. Co., 36 Mo., 543; Harris vs. Han. & St. Jo. R. R. Co., 37 Mo., 307; Moffatt vs. Conklin, 35 Mo., 453; Leary vs. Han. & St. Jo. R. R. Co., 38 Mo., 485.)

II. The justice of the peace had no jurisdiction, the penalty sought to be recovered, exceeding one hundred dollars. (W. S., 807, § 2.)

It may be said, that by the fifth sub-division of section 3 of same chapter, page 808, which gives justices of the peace concurrent jurisdiction with the Circuit Courts, this case is covered.

The fifth sub-division only covers such cases as may arise under the 5th section of chapter 43, (W. S., 520,) which gives the owner the right of recovery, and does not confer jurisdiction for the recovery of the penalty for a failure to fence, under section 43, as before stated.

III. The court allowed incompetent and partial jurymen to try said cause after challenge for cause. These jurors were asked, "If the evidence in this case should be evenly balanced between plaintiff, an individual, and defendant, a corporation, which way would you incline to find?" They severally replied, "I would incline to find for the plaintiff." (Chicago & Alton R. R. Co. vs. Adler, 56 Ill., 344.)

IV. The language of the instruction, given by the court on its own motion, "that the hogs got upon the track by reason of defective fencing," without stating at a point where the appellant was required to fence, is error. (Cecil vs. Pacific R. R. Co., 47 Mo., 246.)

V. The giving of double damages by the court, after a gen-

eral verdict for $50 by the jury, was error. There is nothing in section 43 of the Railroad Corporation law of this State, fixing, or in any manner regulating, the practice in regard to doubling a verdict of a jury. We hold that the only rule that could be applied, would be to instruct the jury to find such double amount as their verdict, or find single damages specially, and then the court to double; and that, on a general finding, the presumption must follow that such judgment was for all damages given by the statute. (Walther vs. Warner, 26 Mo., 143; Cross vs. United States, 1 Gallison, 26.)

VI. There was no proof of the corporate existence of the defendant.

*E. A. Lewis*, for Respondent.

I. Service of process on defendant was properly made, and no erroneous decision of the justice could be regarded in the Circuit Court. (W. S., 849, § 13; 810, § 9; Ser vs. Bobst, 8 Mo., 506; Harper vs. Baker, 9 Mo., 116.)

II. There was no error in the qualifying of the three jurors objected to; the court tested their fitness by a proper inquiry to which their answer was conducive. Their response to the question by defendant's attorney evinced rather an ignorance of the law, than a disqualifying bias.

III. The court committed no error in doubling the damages. (Norton vs. Han. & St. Jo. R. R., 48 Mo., 387; Cross vs. United States, 1 Gallison, 26; Withington vs. Hilderbrand, 1 Mo., 280; Brewster vs. Link, 28 Mo., 147.)

Vories, Judge, delivered the opinion of the court.

This action was brought before a justice of the peace to recover damages for the killing of stock belonging to the plaintiff, by the locomotive and cars of the defendant.

The statement, filed as a cause of action before the justice, charged, that the defendant was a corporation duly organized under the laws of this State, and was at the time of the wrongs complained of, on the 8th day of July, 1872, the owner and occupier of a railroad running through Hickory Grove Township, in Warren county, Missouri; also was the owner

and occupier of a certain locomotive and train of cars running on said railroad; that at said time plaintiff was the owner and in possession of twelve blooded hogs of the value of seventy-two dollars, which said hogs casually, and without the fault of plaintiff, strayed upon the track of said railroad at a point in said township about three miles west of the town of Wright City in said township, where said railroad runs through cultivated fields of land, and where said road was not inclosed by a lawful fence, and not at either a public or private crossing of said road; that defendant negligently, by and with said locomotive and train of cars running as aforesaid, on said road by defendant's agents and servants, ran over and killed eight of said hogs of plaintiff, and crippled the remaining four thereof, being so as aforesaid strayed upon said railroad, to the damage of the plaintiff in the sum of seventy-two dollars; that said hogs were so killed and crippled in Hickory Grove Township as aforesaid, and that said killing and crippling was occasioned by the negligent failure of defendant to construct and maintain fences on the sides of said railroad, &c.

The justice issued a summons in the cause on the 27th of July, 1872, requiring the defendant to appear on the 24th day of August, 1872. The summons was returned by the constable, with the following return indorsed thereon: "The within summons was served by me, by delivering a copy to J. C. Atterbury, depot agent of the defendant, at Wrights in the county of Warren and Township of Hickory Grove, on the 27th day of July, 1872.

HERMAN HULSHER, Const."

On the 24th day of August, the day set for trial, the plaintiff appeared, but the defendant made no appearance. The justice heard the evidence of the plaintiff, and rendered a judgment in his favor for $144. On the 31st day of August, 1872, the defendant appeared, and moved the justice to set aside the judgment by default, and grant a new trial; this being overruled by the court, the defendant appealed to the Warren Circuit Court. On the 25th day of November, 1872,

the defendant appeared in the Warren Circuit Court, and moved said court to dismiss the cause, because, 1st. The justice had not by law jurisdiction over the subject matter contained in the statement of the plaintiff in the cause. 2nd. The justice had not by the process in the cause, and the service thereof, acquired jurisdiction over the person of defendant, and in proceeding to judgment did so without authority of law, and the service is defective, and insufficient to confer jurisdiction. 3rd. The statement of the plaintiff filed with the justice, containing the grounds of his cause of action against defendant, is defective, uncertain and insufficient in law, and upon it plaintiff should not recover judgment. 4th. By the statute, under which plaintiff instituted his suit herein, an action in his name is not authorized, and the plaintiff is not entitled to recover, and cannot properly recover in an action in his own name."

This motion being overruled by the court, the defendant at the time excepted.

When the case came on to be heard, a jury was demanded. Eighteen jurors were called and examined by the parties as to their competency. The attorney for the defendant put the following question to three of the jurors, to-wit: "If the evidence in this cause should be evenly balanced between plaintiff, an individual, and defendant, a railway corporation, which way would you incline to find?" The jurors answered, that they would incline to find for the plaintiff. Whereupon, defendant challenged said jurors for cause. The court, before passing on said challenge, asked said jurymen, if they thought they could try the case fairly and without prejudice or bias? They responded, that they thought they could. The court then overruled the challenge made by the defendant, and the jurors were received and sworn, to which ruling of the court the defendant excepted.

The evidence introduced at the trial tended to prove; that plaintiff resided in Warren county, in Elkhorn Township; that he was the owner of twelve hogs; that eight of them were killed, six of which were of the Chester White breed,

and would weigh forty or fifty pounds each, the other two would weigh over one hundred pounds each; that the other four were crippled and were larger; that the hogs killed were worth from forty to fifty dollars; that the hogs got upon the railroad of defendant, from the plaintiff's woodland inclosed pasture, they got through the fence at a water gap at a small creek; the railroad was fenced through the pasture field, but the water gap was out of repair, so that the hogs got through; the material, of which the water gap was made, had become rotten, and some of the slats were off and out of repair; the hogs had gone through this place on the railroad several times before they were killed; that plaintiff had driven his hogs from the road several times before they were killed, but had not notified the agents of defendant that the water gap was out of repair; that the hogs were found on the railroad track all crushed to pieces, as if run over by the train on the road; that plaintiff made no demand of the defendant for pay for the hogs before bringing suit; that plaintiff had had hogs killed by trains of defendant before, and they refused to pay for them, and therefore no demand was made before suing; that after the hogs were killed and crippled, the defendant made a fence on each side of the road into the culvert, through which the water of the creek, where the water gap was erected, ran, which made the fencing safe; there was brush and weeds on the grounds of the defendant near the water gap; that the section boss passed the place frequently.

The defendant introduced evidence which tended to prove; that the hogs killed were not worth more than from twenty to twenty-five dollars; that the water gap was difficult to keep in a condition to keep hogs of the size of those killed from getting through; that it always had to be repaired after a rain; the section foreman had driven the hogs from the road at one time before they were killed, traveled the road almost daily, but had not observed that the water gap was out of repair at the time the hogs were killed.

At the close of the evidence, the court instructed the jury as follows:

"To entitle the plaintiff to recover, it must be satisfactorily shown to the jury from the evidence, that the hogs, on account of which this suit is brought, were struck, killed, or injured by defendant's railroad machinery on that part of the track passing through inclosed fields, and not at a public or private crossing, and that the hogs got on the track by reason of defective fencing on the part of defendant. The measure of damages, in the event of recovery, is actual market value of the hogs killed, including any depreciation in the market value on account of injuries inflicted by defendant's locomotive and machinery."

To the giving of which instruction the defendant at the time excepted.

The defendant then asked the court to instruct the jury,

First—"That upon the evidence in this case the plaintiff cannot recover."

Second—"The court instructs the jury, that before the plaintiff can recover in his action herein, he must show that defendant is a corporation organized and doing business under the laws of the State of Missouri."

Third—"The court instructs the jury, that under the statement in this case before the plaintiff can recover, they must believe from the evidence, that the hogs strayed upon the track of defendant at a point where the defendant was bound by law to fence its track, and if they further believe from the evidence, that the hogs strayed upon the railroad track of defendant from timber land, then, before they can find for plaintiff, they must believe from the evidence, that the killing and crippling were occasioned by the negligence of defendant in operating its locomotives and cars on its said road."

The court gave the instruction numbered two, asked for by the defendant, and refused those numbered one and three; to the refusal of the court to give the instructions numbered one and three the defendant excepted.

The jury found a verdict in favor of the plaintiff for fifty dollars.

The plaintiff moved the court to render a judgment for double the amount of the damages found by the jury, for the reason, that the action was founded on section 43, Wagner's Statutes, 310.

The court sustained the said motion, and rendered judgment in favor of the plaintiff for the sum of one hundred dollars, with costs, &c.

The defendant in due time filed its motion for a new trial, setting forth as grounds therefor all of the opinions of the court excepted to, as well as that the court had improperly rendered a judgment for double damages, and that the verdict of the jury was against the evidence, and against the law as given them by the court.

This motion being overruled by the court, the defendant again excepted.

The defendant then filed a motion in arrest of the judgment; because the justice of the peace had no jurisdiction of the cause or of the person of defendant; because the statement of plaintiff's cause of action was insufficient; because the suit could not properly be brought in the name of the plaintiff; and because the judgment and proceedings are otherwise erroneous.

This motion was also overruled by the court, and the defendant again excepted and appealed to this court.

It is first insisted by the defendant, as a ground for the reversal of the judgment, that the justice of the peace had no jurisdiction over the subject of the action, and that if any such jurisdiction did exist, that then the suit under the 42d section of the statute concerning Railroad Corporations (1 W. S., 310) should have been brought in the name of the State, and that no suit could be maintained under the 43d section of the same act in favor of or in the name of the party injured. By the fifth clause of the 3d section of the 1st article of the statute concerning Justices' Courts (2 W. S., 808) it is provided, that "in all actions against any railroad company in this State to recover damages for the killing, crippling or injuring of horses, mules, cattle or other animals, within their

respective townships, without regard to the value of such animals, or the amount of damages claimed for killing, crippling or injuring the same," justices of the peace and the Circuit Court shall have concurrent jurisdiction. This statute is general and comprehensive in its terms, applying to all railroad companies, and we have been referred to no special provision of any statute exempting defendant from its operation. From which it will be seen, that the justice of the peace clearly had jurisdiction over the subject matter of the action. But it is contended, that the action should have been brought in the name of the State of Missouri. The 42d section of the statute concerning Railroad Companies, before referred to, provides, that "all penalties imposed upon railroad companies by this chapter may be sued for in the name of the State of Missouri; and if such penalty be for a sum not exceeding one hundred dollars, then such suit may be brought before a justice of the peace, and may be commenced by serving a summons on any director of such company." It is contended by the defendant, that this section was intended to include all actions brought under the chapter referred to, whether the damages were damages to persons for injuries to their property or otherwise, and that all such actions must be brought in the name of the State, and if for a sum over one hundred dollars, whether for injuries to stock or otherwise, the suit cannot be brought before a justice of the peace. I do not think this to be a proper construction of the statute.

By the 36th section of said chapter, all baggage of passengers with a handle or loop is required to be checked, and a duplicate given to the passenger or person delivering the baggage, "and if such check be refused on demand, the corporation shall pay to such passenger the sum of ten dollars to be recovered in a civil action; and further, no fare or toll shall be collected or received from such passenger, and if such passenger shall have paid his fare, the same shall be refunded; and on producing such check, or, if he have no check, on demanding his baggage, if it be not delivered to him he shall recover the value thereof." I suppose it would hardly be

contended, that under this section the passenger could not recover for his baggage in his own name, if it was not delivered to him on demand; the value of his baggage could not be considered a penalty within the contemplation of the 42d section; but suppose the check for the baggage is refused, then the statute in the same section provides, that the corporation shall pay to such passenger the sum of ten dollars to be recovered in a civil action. The question is, how would this civil action be brought? Would it have to be brought in the name of the State as contemplated in the 42d section for the recovery of penalties, or could it be recovered by the passenger in his own name? We think that in such case the passenger might bring the action in his own name; the money is to be paid to the passenger; he has a right to the money; a civil action is given for its recovery; and there is no reason why the suit should not be brought in his name.

Again, by the 38th section of the same act a penalty of twenty dollars is inflicted against a railroad company for a failure to ring the bell as therein provided, and it is therein provided, that it shall be sued for by the Circuit Attorney of the proper circuit within ten days, one-half to go to the County and the other half to the informer. It is not provided in this section in whose name the suit shall be brought; the penalty is for the informer and the County; the suit is to be brought by the Circuit Attorney, and it is natural that a provision should be made for bringing such suit in the name of the State; and there are a number of other penalties provided for in the act, which are not provided for the benefit of a person who is aggrieved; in all such cases the suits should be brought in the name of the State; but where an individual is injured or damaged by the act of the road, and a compensation is provided for the injury, although the compensation is in the nature of a penalty, yet such cases are not within the contemplation of the 42d section providing for the collection of penalties in the name of the State, and we further think, that if the statute should even be so construed as to authorize the suit in such case to be brought in the

name of the State, that the word *may* as used in the statute, should not even then be construed to mean *shall*, but that it would only give an additional method of prosecuting such suits, and that a party who was to receive compensation for an injury, and being the real and only party interested in the suit, might at his election sue in his own name. In construing this statute so far as it applies to the rights of a private individual to recover for injuries received by him, it should be construed as a remedial and not a penal statute, and we cannot believe, that it was the intention of the Legislature to restrict individuals to sue for such injuries in the name of the State. This, so far as we know, has been the universal construction of this statute from the time of its passage. Out of hundreds of suits brought to recover double damages under the 43d section of this statute, for the killing or crippling of stock, we know of none that were brought in the name of the State. We think this construction is reasonable, and will not now venture a different construction of the statute. It is thought by the defendant, that the act of the Legislature, concerning the jurisdiction of justices of the peace in cases for the recovery of damages for killing or crippling stock, only refers to cases brought under the fifth section of the statute concerning Damages and Contributions. (W. S., 520.) This statute only provides, that in certain cases damages may be recovered from railroad companies for killing stock without proving negligence. The law concerning justices' courts provides, that in all actions against any railroad company in this State for killing, crippling or injuring horses, mules, cattle, &c., justices shall have jurisdiction without regard to value, &c.

This language is broad enough to include all such actions, whether brought under the one statute or the other.

The next objection made by the defendant to the action of the Circuit Court is, that the court overruled its challenge for cause to three of the jurors who tried the cause; this is also assigned as error by the defendant. The defendant, when the jury was being impaneled, asked three of the jurors, that

"if the evidence in the case should be evenly balanced between plaintiff, an individual, and defendant, a corporation, which way would you incline to find?" They answered, that they would incline to find for the plaintiff. The jurors were then challenged for cause. The court then asked those jurors, if they thought they could try the case fairly and without prejudice or bias? To this they responded, that they thought they could. The court then overruled the defendant's challenge of said jurors. It is contended, that these jurors were incompetent to serve in the case, and we are referred to the case of the Chicago & Alton Railroad Co. vs. Adler, 56 Ills., 344, as an authority in point. That case is not exactly in point. In that case the same question was asked the jurors that was asked in this, but the jurors answered, that they would in such case lean against the defendant, and one of them stated, he would do so because the company were able to stand it, and he thought a private individual should "have a little might the advantage." The court did not in that case follow up the answer of the jurors by asking them, if they could try the case without prejudice or bias, as was done in this case, and, in fact, the answers of the jurors in that case were very different from the answer in the case under consideration, and tended more strongly to show prejudice in the minds of the jurors.

The learned judge, in delivering the opinion of the court in that case, says, that "when a juror avows that one litigant should have any other than the advantage which the law and evidence give him, he declares his incompetency to decide the case. He thereby proclaims, that he is so far partial as to be unable to do justice between litigants, or that he is so far uninformed, and his sense of right is so blunt, that he cannot perceive justice or, perceiving it, is unwilling to be governed by it."

This language may be proper in the case before the judge who used it, but we think that it is no evidence of stupidity or dishonesty in a juror in a case where the evidence is exactly balanced to be ignorant of the fact, that in such case the

law is in favor of the defendant, or that the evidence must preponderate in favor of the plaintiff to entitle him to recover. In such case if the juror had been further asked, that if he were instructed by the court, that when the evidence was equally balanced he must find for the defendant, whether he would then be governed by the instructions; if he answered that he would, he would certainly be competent. Our experience is that jurors usually obey the instructions of the court.

In this case the jurors answered the judge, that they could decide the case without partiality or bias; and to take their answers all together it is only shown, that they were not lawyers; in fact, it is generally understood, that jurors are not informed in reference to where the preponderance of evidence is required, and therefore it is usual for the attorneys in a case to ask the court to inform the jury by an instruction upon whom the burthen rests to prove the different issues in the case. The court so instructed the jury in this case, and we do not think that it was error in the court to accept the jurors objected to.

We think, that the service of the summons by the constable in this case was in substantial conformity to the statute, and that the defendant was properly in court.

The only additional points relied on by the defendant in this case grow out of the action of the court in giving and refusing instructions as to the law of the case. The defendant moved the court to instruct the jury, that upon the evidence in the case the plaintiff could not recover. The objection of the defendant to the instruction given by the court, and the grounds upon which the defendant asked the instruction before stated, seem to be mainly predicated on the fact, that there was no evidence on the part of the plaintiff to prove, that the defendant was a corporation. This was not necessary in this case; the defendant had appeared and defended as a corporation, using the very name in which it was sued; had in the progress of the case executed bonds filed in the cause authenticated by its corporate seal, and, in every

way, that it could be done, recognized its corporate existence, and tried and defended the case on the merits to final judgment in its corporate name. It was too late after this to complain that there was no proof of its corporate existence. The court improperly (as I think), under such circumstances, instructed the jury, that before plaintiff could recover, he must show, that defendant was a corporation organized and doing business under the laws of this State. We think this instruction was too strong against the plaintiff, for the reasons before stated, that defendant had by its acts waived any question which might have been made as to its corporate existence, but the plaintiff does not complain.

It is next complained by the defendant, that the court erred in refusing the third instruction asked for by defendant. This instruction tells the jury, that they must find, the "hogs strayed on the road at a point where the defendant was bound by law to fence its track." This was a question of law, which ought not to have been submitted to the jury without also telling them at what points the track was required to be fenced. The court, in the instruction given to the jury, had fairly instructed the jury on that subject, and properly refused the instruction as asked by the defendant. The instruction asked by the defendant also told the jury, that if the hogs entered on the railroad from timbered land, then in order to a recovery on the part of the plaintiff, the killing of the hogs must be shown to have been caused by the negligence of the defendant in conducting its trains. The statute requiring railroads to be fenced does not confine or limit the parts to be fenced to prairie or untimbered land, but the language used is, "along or adjoining inclosed or cultivated fields or uninclosed prairie lands, &c." The evidence in this case shows, that the land, from which the hogs escaped on to the road, was inclosed pasture lands, and this was sufficient.

This suit was brought and tried under the 43d section of the Railroad law (W. S., 310), and the instruction given by the court fairly presented the law of the case to the jury. The cause of action was substantially good, and the court did

right in doubling the damages found, on the motion of the plaintiff. (Norton vs. Hannibal & St. Joe. R. R. Co., 48 Mo., 387; Brewster vs. Link, 28 Mo., 147.) We see no substantial error in the case.

The judgment will be affirmed; the other Judges concur.

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WILLIAM FLENTGE, Respondent, *vs.* JOHN V. PRIEST, Appellant.

1. *Practice, civil—Pleadings—Necessary allegations—Replevin.*—In an action of replevin for the seal of the court, and a book called a "fee-book," the defendant answered, that he held these articles by virtue of a writ issued by the judge of that court, (W. S., 1136, § 5,) and copied the writ into the answer. *Held*, that the writ and its recitals constituted no defense, but the answer must allege affirmatively, the authority of the judge to issue the writ, that defendant was clerk of the court, and that the plaintiff had been removed from said office upon conviction of misdemeanor in office.

2. *Statutes, construction of—Records obtained by warrant—Constitutionality.*—The statute, (W. S., 1136, § 5,) authorizing a judge of the Supreme or Circuit Court to issue his warrant to a sheriff, commanding him to seize the books, &c., belonging to an office, detained by the former incumbent thereof, and deliver them to the proper officer, is not unconstitutional. It merely places the property in the custody of the law. It determines no right to the property, and leaves to claimants their legal remedies for the recovery of the same.

*Appeal from Cape Girardeau Court of Common Pleas.*

*Lewis Brown*, for Appellant.

I. Our statute, (2 W. S., Chap. 114,) giving to certain officers power and jurisdiction to order the arrest and seizure of public records, is in its nature a special writ of replevin, and can only issue to retake public property therein specified. The importance of such records to the public, as well as a sound public policy, forbid a resort to the usual and ordinary remedy under a claim and delivery of personal property, as provided for other cases. In so far as this statute particularly specifies against what property the warrant is directed, in what events and how it is to issue, it is an exception to the general statute concerning the process of claim and delivery

of personal property. Where a new right, or the means of acquiring it, is given, and an adequate remedy for violating it is given in the same statute, injured parties are confined to that remedy. (Smith vs. Lockwood, 13 Barb., 209; Thurston vs. Prentiss, 1 Mich., 193; Bassett vs. Carleton, 32 Me., 553; Renwick vs. Morris, 7 Hill, 575.)

And where the tribunal is specified wherein the redress is to be sought, all others are excluded; so too, of the particular process. (Millar vs. Taylor, 4 Burr., 2303; Smith vs. Lockwood, *supra;* Andover vs. Gould, 6 Mass., 40; Franklin Glass Co. vs. White, 14 Mass., 286; State vs. Lafayette, 41 Mo., 40.)

II. Our Circuit Courts are courts of general jurisdiction, and the rule among courts of concurrent jurisdiction is, that the jurisdiction, that first attaches, will retain it to the exclusion of all jurisdictions attaching subsequently. (Smith vs. McIver, 9 Wheat., 532; Pulliam vs. Osborne 17 How., (S. C.,) 471.)

The court below is a court of local and limited jurisdiction. (Sess. Acts 1853, p. 81; Schell vs. Leland, 45 Mo., 289.) Hence Chapter 114 excludes the court below in this case, as well as its process.

III. The Circuit Court itself has no jurisdiction, by a resort to the process of claim and delivery of personal property, to arrest or seize records, or even to litigate the right of their possession. Replevin does not lie where the original caption was lawful. (Gardner vs. Campbell, 15 Johns, 401; Marshall vs. Davis, 1 Wend., 109.)

IV. A court must have jurisdiction of the entire matter, or it has none at all; a judgment is an entirety, good as to all, or bad as to all. Nor can a cause of action be split into three several causes between the same parties, and one part in the Circuit Court, and two other parts in an inferior court, as is the case here. (Dickerson vs. Chrisman, 28 Mo., 134; Smith vs. Rollins, 25 Mo., 408; Pomeroy vs. Betts, 31 Mo., 419; Covenant Ins. Co. vs. Clover, 36 Mo., 392.)

V. The articles mentioned and intended by the warrant of

the circuit judge are to be considered as being *in custod liae-gis;* from this custody they cannot be retaken except by a process issuing from a superior officer or court, certainly not from an inferior court.

VI. The right of the possession of the county seal and fee-book belongs to the county clerk, and plaintiff to succeed must prove that he is such clerk, which can only be determined by an action of *quo warranto.* We refer to the *quo warranto* cases decided by this court, and to State vs. Lafayette, 41 Mo., 545; State vs. Howard, 41 Mo., 247.

*Louis Houck*, for Respondent.

I. It was not sufficient to state merely the alleged warrant and return in the answer. The pleader should have stated such facts as would have authorized its issue. Where a defendant justifies a seizure under a *fieri facias*, it is necessary to set out, that it was duly issued upon a judgment duly rendered by a court having jurisdiction of the person and subject matter, and that the writ was in full force. (29 Ill., 525; Wise vs. Withers, 3 Cranch., 331; Smith vs. Shaw, 12 Johns., 257; Suydam vs. Keys, 13 Johns., 444; Cable vs. Cooper, 15 Johns., 157.) And it is also clear, that replevin as well as trespass lies in such case. (Pangburn vs. Patridge, 7 Johns., 140.) And that the parties concerned in the issue and levy of the warrant are all trespassers. (Wise vs. Withers, 3 Cranch., 331; Moravia vs. Sloper, Willes, 30; Morse vs. James, Willes, 122.)

II. Every plea must be so pleaded as to be capable of trial, and, therefore, must consist of matters of fact, the existence of which may be tried by a jury as an issue, or its sufficiency as a matter of defense determined by the court on a demurrer. (Mills vs. Martin, 19 Johns., 34, citing Cowp. 682; Com. Dig. "Pleader," 617; Co. Lit., 303; 2 Bos. and Pul., 267; 16 Johns., 163; 1 Saund., 23, n. 5; Armstrong vs. McMillon, 9 Mo., 721.)

III. The statute upon which the warrant set out in the plea was issued, (2 W. S., 1136,) is unconstitutional.

The constitution provides, "the judicial power * * * shall be vested in a Supreme Court, in Circuit Courts, and in such inferior courts, as the General Assembly may from time to time establish." This statute does not vest in a court, but in individuals, arbitrary power: it provides an *ex parte* proceeding; it provides, that the warrant to seize the records, books and papers, shall be issued upon the affidavit of any person; it does not provide for a citation of the opposite party; it provides for no trial, for no judgment, and for no appeal to a superior court; it does not provide before what judge the application for this warrant shall be made, but says, that the claimant may go before any "judge, of the Supreme, or Circuit, Court."

The Judge of the Nodaway Circuit Court may issue his warrant to seize the records, books and papers of a *de facto* officer of Cape Girardeau county.

It may be argued, that if any one feels aggrieved, that the 8th section provides, that any one aggrieved can apply to any judge of the Supreme or Circuit Court, who upon affidavit of the applicant, that injustice may be done, or is about to be done, by such warrant, shall issue a citation to all persons interested, &c.

But if any such application should be made to any judge of this court, doubtless the answer would be, that the Supreme Court has appellate jurisdiction only, and that it could only issue certain original remedial writs, specified in the constitution or known to common law.

Nor could any one of the judges of this court be required to issue a citation to try the right to the possession of the records, books and papers, claimed by different parties, any more than they could be required to examine the questions of law and fact growing out of a disputed demand of the public printer. (Foster vs. State, 41 Mo., 61.)

If in the case of Foster the act was held void and unconstitutional, because it imposed a duty on the court expressly prohibited by the constitution, certainly an act, requiring the judges of the Supreme Court to hear and try the claim and

to render a verdict, would be equally void. Yet by reference to the eighth and ninth sections of this act, (2 W. S., 1136,) it will be seen, that such a course of proceeding is contemplated by the act. This court has held, that the statute conferring on the Supreme Court jurisdiction to try a contest for an office is unconstitutional. (Vail vs. Dinning, 44 Mo., 210.) The statute under consideration is a similar statute, with a similar object. If Flentge was the *de facto* officer and Priest was entitled to the office, the remedy of Priest was by *quo warranto*, and not by an *ex parte* application to the judge. This court has also held, that the statute, conferring upon it jurisdiction to try clerks for misdemeanors in office, is unconstitutional. (State vs. Flentge, 49 Mo., 488.)

It would seem to be clear that the statute so far as it relates to the judges of this court is void and unconstitutional. If this portion of the act be constitutional, the property, to which a party may be entitled, can be taken away without giving him any redress in a superior court. A party may be deprived of his property without a trial, without notice, without a hearing, and without a chance for an appeal to a court not swayed by prejudice. Such a statute would seem to violate every principle of justice, right and law.

IV. The act is also void as to the circuit judges. The constitution provides, that the judicial power shall vest in the Supreme, Circuit and such inferior tribunals, as may be established from time to time by law. The constitution contemplates, that the judicial power shall vest in courts. Not only that, but our bill of rights provides, that the right of trial by jury shall remain inviolate. This statute attempts to vest in "any judge of the Supreme or Circuit Court" the power to issue a warrant to seize the property in the possession of a citizen and give it to some one else. This is the exercise of a judicial power. If this be so, the statute is unconstitutional, because the judicial power must be vested in a court, not in the individual who for the time being, may be the judge of the Circuit Court. Again, if the property be in possession of any citizen, he cannot be deprived of it, without the judg-

ment of a court; nor without a "trial by jury," because the trial by jury in this State "shall remain inviolate."

ADAMS, Judge, delivered the opinion of the court.

This was an action in the nature of replevin for the seal of Cape Girardeau County Court, a book called a "fee-book," a Webster's Dictionary, a German-English Dictionary, and a lot of revenue stamps of the value of thirty dollars.

The defendant by answer denied all the allegations of the petition, and then for further answer alleged, that the court had no jurisdiction, because the county seal and "fee-book" referred to had been delivered to the defendant under and by virtue of a writ, or warrant, issued by the judge of the Cape Girardeau Circuit Court, and that he held them under such delivery, and in no other manner. This writ is copied into the answer and recites, that the plaintiff was former clerk of the County Court of Cape Girardeau county, but had been removed from office by virtue of a judgment and conviction for misdemeanor in office, rendered against him in the Circuit Court at its May term, 1872.

The writ further recites; that the defendant had been appointed and commissioned by the Governor of Missouri, on the 5th day of December, 1872, as clerk of said County Court; that he had accepted the office, and given bond to perform the duties; and it is also recited, that the plaintiff had failed and refused to deliver to the defendant the records, books, papers, archives and appurtenances of the office. The writ then commanded the sheriff, to whom it was directed, to seize the books, records, &c., aforesaid, and deliver the same to the defendant.

This portion of the answer setting up this writ as a justification, or rather as a plea to the jurisdiction of the court, was stricken out on motion of the plaintiff, and the only question raised by the record is, whether this ruling of the court was right.

The answer contains no affirmative allegations, that the defendant was the clerk of the County Court, nor does it con-

tain any affirmative allegation, that the plaintiff had been removed from office by the judgment of the Circuit Court, on being convicted of a misdemeanor in office. Without such affirmative allegations, that portion of the answer presented no defense. The writ itself and the recitals formed no defense whatever to this action.

If the officer, who served the writ, had been sued in trespass, the writ might have been a justification for him; but the defendant cannot rely upon the writ alone. He must allege and prove affirmatively, independent of the recitals, the authority of the judge to issue the writ. If this had been done, I think the defense would have constituted not a plea to the jurisdiction of the court, but a bar to the plaintiff's action as to the seal and "fee-book."

The law authorizes the Circuit Court judge to issue such a writ on affidavit. (2 W. S., 1136, § 5.)

The act of issuing the writ is simply ministerial and not judicial. It is a summary mode provided to return, the records &c., belonging to an officer, to their proper custody.

The issuing of the writ, and its service, determines no right to the property or to its custody. It leaves the parties to all of their remedies in the premises, as they existed before the issue of the writ. It is urged by the learned counsel for the respondent, that the statute, authorizing this summary proceeding, is unconstitutional and void, because it is not due process within the meaning of the bill of rights. It does not deprive the party of his property, but places it in the custody of the law, where it is presumed to belong, until the contrary appears. It is the nature of a writ of replevin giving the custody of the property to the officer, without requiring him to execute a bond for its return, and leaves the claimant to his action for its recovery, or such other remedy as the law gives him. But under the view I take, the defense was not properly pleaded.

Judgment affirmed. The other Judges concur.

ANGELO WISER Respondent, *vs.* JONATHAN CHESLEY, Appellant.

1. *Practice, civil—Instructions—Gross negligence.*—An instruction declaring that a party was responsible only for gross negligence, without defining what was in law "gross negligence," is improper.
2. *Bailment—Deposit with inn-keeper—What care required.*—An inn-keeper who gratuitously receives a deposit of valuables, is only responsible in case of their loss for gross negligence; *i. e.* for that omission of care which even the most inattentive and thoughtless never fail to take of their own concerns.
3. *Bailment—Deposit—Liability—Onus.*—A depositor makes out a *prima facie* case when he shows a deposit made, and a demand and refusal of the thing deposited. The *onus* is then upon the depositary to exonerate himself from the liability which attached when he assumed the custody of the article.

*Appeal from St. Louis Circuit Court.*

*Melville Smith*, for Appellant.

I. The burden of proof concerning negligence is not on defendant but on plaintiff. (McCarty vs. Wolf, 40 Mo., 520; 1 Smith's Lead. Cases, 421–422 (notes to 6th Ed., 1866); Harrington vs. Snyder, 3 Barb., 380; Foot vs. Storrs, 2 Barb., 327; Runyan vs. Caldwell, 7 Humph., 134; Mims vs. Michell, 1 Texas, 440; Schmidt vs. Blood, 9 Wend., 268; Story on Bailments, 225–226.)

II. Being a bailee without reward, and without any special contract, he was liable only for gross negligence, and bound only to exercise reasonable care in keeping the money. (McLean vs. Rutherford, 8 Mo., 109; Ducker vs. Barnett, 5 Mo., 97; Russell vs. Lynch, 28 Mo., 312; Tracy vs. Wood, 3 Mas., 132; Sto. on Bail., 62–80; Jones on Bail., 82–83; Roueston vs. McClelland, 2 E. D. Smith, 61; Shiels vs. Blackburne, 1 H. Bl., 158; Foster vs. Essex Bank, 17 Mass., 479; Stanton vs. Bell, 2 Hawks, 145; Tompkins vs. Saltmarsh, 14 S. & R., 275; Monteath vs. Bissell's Admr., Wright's (Ohio), 411.)

*Garesche & Mead*, for Respondent.

SHERWOOD, Judge, delivered the opinion of the court.

This was an action instituted before a justice of the peace by Wiser against Chesley for money alleged to have been

deposited with the latter by the former. The cause was tried anew in the Circuit Court.

The defendant at the time of the deposit was the proprietor of the St. Clair Hotel and the plaintiff a boarder there, and the evidence tended to show, that plaintiff had deposited with the clerk of the defendant the amount of money for which suit was brought; that the money had been put in the safe of the hotel, and a check as evidence of such deposit returned to plaintiff, who frequently came and obtained from one of the clerks his package of money and sometimes added thereto, and at one time took $10 therefrom, and that finally the package of money was missing and could not be found, nor was it returned to plaintiff on his demand. The evidence also tended to show, that the safe was secure, kept locked, and in the office where one of the clerks or the proprietor remained day and night; that plaintiff often obtained the package of money from one of the clerks without the presentation of his check, but that when receiving it from the other he always presented his check; that the package never could have "got out of the safe" without the knowledge of the proprietor or clerks; that in that safe were kept the money and valuables of the guests and of the proprietor, who, however, usually kept the most of his money in the bank; that no charge was made for keeping plaintiff's money; that plaintiff knew the way in which the money packages, &c., deposited in the safe, were kept; that no money package had ever been lost from the safe, and, although there was some conflict of testimony on the point, yet the evidence certainly tended very strongly to show, that the check presented by plaintiff as the token of his deposit had never been received by him from either the proprietor or his clerks, and that no check of that description had ever been kept in the house. But no objection was made, it seems, to the check when the package was demanded.

The defendant asked the court to instruct the jury as follows:

The jury are instructed, that the mere fact that the money

was lost, if they so find, in the absence of evidence of gross negligence or fraud, does not make the defendant liable therefor."

"The jury are instructed, that the defendant was only bound to exercise reasonable care in keeping the money of the plaintiff. That he is responsible only for gross negligence or for a violation of good faith."

These instructions the court refused to give; to which ruling the defendant excepted, as well as to the action of the court in giving the following instructions in behalf of the plaintiff: "If the jury believe from the evidence, that the defendant took from the plaintiff for safe keeping the sum of $138, and did not return the same, and that the same was lost or mislaid, and that defendant did not take such care of said money as a prudent person would take of funds so entrusted to him, then the jury will find for plaintiff for the amount they find Chesley received, with interest from the commencement of this suit. What is reasonable care is a question for the jury to determine, and the burden of proof rests on defendant to show, that he did take reasonable care of said money."

The jury found for the plaintiff, and the defendant brings this case on appeal and assigns for error, the same grounds as taken in the above exceptions.

The court, I think, properly refused to instruct the jury as asked by defendant, for the reason that although the instructions may perhaps have been abstractly and theoretically correct, yet they were well calculated to mislead the jury, as they did not define what gross negligence was. (See Mueller vs. Putnam Fire Ins. Co., 45 Mo., 84.) But the court manifestly erred in giving the instructions which it gave on the part of plaintiff, as to the care which the defendant should have exercised. Chesley was but a mere depositary—a bailee without recompense or reward. The contract of bailment was entered into, not for his benefit, but for the benefit of the bailor alone. The measure of the depositary's diligence therefore was the slightest known to the law. (Sto. Bailm. §§ 23–64.) And he was responsible only for "that omission

of care which even the most inattentive and thoughtless never fail to take of their own concerns," in other words for gross negligence. (Tompkins vs. Saltmarsh, 14 S. & R., 275.) And in all mere gratuitous undertakings, whether deposits or mandates, the same general rule as to the diligence to be exercised prevails.

In Stanton vs. Bell, 2 Hawks, 145, the defendants were mandatories, and the court then held, that the charge to the jury, "that the defendants were bound to use that care and diligence which a prudent and discreet man would use relative to his affairs," was erroneous, and upon that ground the judgment was reversed. The court holding, that such a charge would only have been proper where the mandatory acted for compensation There was no error however in the latter portion of the instruction referred to—that which related to the burden of proof.

The depositor makes out a *prima facie* case, when he shows a deposit made, and a demand and refusal of the thing deposited. The *onus* is then upon the depositary to exonerate himself from the liability, which attached when he assumed the custody of the article with which he was entrusted. (See Edward's Bailm., 88; Beardslee vs. Richardson, 11 Wend., 25; McNabb vs. Lockhart, 18 Ga., 495.)

The judgment is reversed and the cause remanded the other Judges concur.

AARON MCPIKE, Respondent, *vs.* WILLIAM J. ALLMAN, Appellant.

1. *Sheriff's deed—Vagueness of description—Parol testimony to identify, when admissible.*—It may be considered as now settled in this State, that parol evidence is admissible to identify land vaguely described in a sheriff's deed; and it is proper to show that the tract was well known by the description given; provided, that the description was sufficient to prevent persons from being misled as to the identity of the land, and to prevent a sacrifice of it at the sale.
2. *Sheriff's deed—Vagueness of description in—Parol evidence.*—In ejectment, plaintiff claimed under a sheriff's deed, which described the land as "eighty acres, part of the west half of section thirty-one, township fifty-three, range five," and recited that the sale was made by virtue of an execution against John B. Crow. Parol evidence was introduced which showed that the tract was not known in the community by the description of "eighty acres part of the west half," etc.; but that it was known as the land of Crow; that the land and the surrounding land was prairie; that Crow owned no other land in the immediate neighborhood; that it was generally known, that he had sold the north 120 acres of the section, and owned no land in the half section but eighty-three acres on the south end.

*Held*, that the sheriff's deed was not void by reason of its vagueness, and that the sale passed the title.

*Appeal from Pike Circuit Court.*

*E. Robinson*, for Appellant.

I. The deed from the sheriff of Ralls Co. to McPike was on its face so vague and uncertain as to fail to describe any land whatever, and was, therefore, of itself, void, (2 Caines 65; 2 Wash. Real Prop. side p. 622; 13 Johns., 67; *Id.* 532), and the other evidence introduced did not supply the want of a proper description in the said deed, or cure the defect. (34 Mo., 579.)

II. The deed should have described the land with such certainty, as that it could have been located and identified from the description itself; and in the event of a failure to do so, the omission could have been supplied only by evidence showing, that the "80 acres" of land sued for was generally known, in the community where it was sold, by the particular description given in the said sheriff's deed. This is as far as the courts have ever gone. (7 Mo., 531; 8 Mo., 177; 15 Mo., 309; Clemens vs. Rannells, 34 Mo., 579.) But there was no testimony in the cause which gave any certainty to the

description. The testimony did not tend to prove, that the description given in the sheriff's deed, "80 acres, part of the west half of Sec. 31, Tp. 53, Range 5," had acquired any meaning in the community as descriptive of any particular tract of land whatever. The testimony did not tend to show that any particular "80 acres" was indicated by such description. The evidence showed that Jno. B. Crow owned "83 12-100 acres" in the west half of Sec. 31, but the proof did not tend to show what particular part, indeed, did not tend to show, that any particular part of said "83 12-100 acres" was indicated or known by the description, "80 acres, part of W. 1-2 of Sec. 31, Tp. 53, R. 5.

III. As the testimony did not tend to prove the location or identity of the "80 acres" called for in the sheriff's deed, the court erred in admitting said deed in evidence. (See 34 Mo., 579.)

*Fagg & Dyer and H. W. Biggs*, for Respondent.

I. There can be no doubt as to the propriety of admitting extrinsic evidence to show the location and exact description of the land intended to be conveyed. (Hart vs. Rector, 7 Mo., 531; Bates vs. The Bank, 15 Mo., 309; 17 Mo., 583; Lisa vs. Lindell, 21 Mo., 127.)

In the case of Clemens vs. Rannells, 34 Mo., 579, relied upon by the appellant, the extrinsic evidence offered by plaintiff to explain the description in the sheriff's deed was passed upon by the court trying the case, as insufficient, and the deed was excluded.

In case of Webster vs. Blount, 39 Mo., 500, the finding of the jury upon the extrinsic evidence introduced was sustained. The very object of permitting oral testimony is to identify the premises sold. This case is almost identical with the last case cited. In that case the description in the sheriff's deed was "one hundred and ten acres part of the N. W. 1-4 of Sec. 26 in T. 59 R. 34." Here the description is "80 quarter acres, part of the west half of Sec. 31, T. 53, R. 5." The proof tended to show most conclusively, that Crow had no

other land in that section; that this south end of the fractional quarter in question was known in the community as Crow's land. The substance of the description of the land, as sold, really was all the interest and claim of Crow in that particular quarter section. That was sufficiently known in the community to prevent parties interested, or bidders at the sale, from being deceived as to the location of the premises sold. The quarter section, the number of the section itself, township and range, are all accurately given. The quantity stated is not to be taken in this case as an essential part of the description.

Vories, Judge, delivered the opinion of the court.

This action was brought in the Ralls Circuit Court, from which it was transferred for trial, by the agreement of the parties, to the Pike Circuit Court.

The action was ejectment brought to recover possession of a tract of land described as being "eighty acres off the south end of the west half of section thirty-one, township fifty-three, range five west."

The answer denied all the material allegations of the petition.

At the trial the plaintiff read in evidence a patent from the United States to Otho Pool, dated October 30, 1857, for the west half of section 31, township 53, range 5 west, containing 203 12-100 acres; also, a deed from Pool and wife to John B. Crow for the same land. The plaintiff then offered to read in evidence a deed from the Sheriff of Ralls county to the plaintiff, dated the — day of August, 1869, purporting to convey to plaintiff a tract of land described as follows: "80 acres, part of the west half of section 31, township 53, range 5," which deed recited that the sale was made by virtue of an execution against John B. Crow, and in favor of Aaron——, issued on a judgment rendered in Louisiana (Pike county) Court of Common Pleas. To the introduction of the deed in evidence the defendant objected, on the ground of the vagueness of the description of the land, and that no land was described. This objection was sustained by the court. The

plaintiff then; as preliminary to the introduction of said sheriff's deed, offered in evidence a deed from John B. Crow and wife to Robert W. Thompson, for 120 acres off from the north end of the west half of section 31, township 53, range 5 west. To the reading of which deed the defendant objected. His objection being overruled by the court, he excepted. The plaintiff then introduced, as a witness, one Perry A. Curry, who testified that some short time before the sale of the 120 acres to Robert W. Thompson by John B. Crow, he was employed by Crow to survey off from the north end of the west half of section 31, township 53, range 5 west, and did survey 120 acres off from the north end of said half section; that Crow told him at the time, that he owned the remainder of said half section, containing 83 12-100 acres; that there were no improvements on any part of said half section at the time. The defendant, at the time, objected to the evidence given by said witness, but the court overruled his objection, and the defendant excepted.

Robert W. Thompson was then examined on the part of the plaintiff, and testified, that he bought 120 acres of land off from the north end of the west half of section 31, township 53, range 5 west, from John B. Crow. The remainder of said half section, containing 83 12-100 acres, was south of the land purchased by witness. As to the general reputation in the community as to who was the owner of the remainder of said half section, after the purchase of witness, he could not say. Witness knew it belonged to Crow, but he had never heard it talked of in the community. Otho Pool, a witness for the plaintiff, stated, that he had entered the west half of section 31, township 53, range 5 west, and sold it to John B. Crow, who sold 120 acres off from the north end to Robert W. Thompson; that it was known in the community, that the remainder of the land belonged to Crow.

On cross-examination the witness further stated, that he lived some six miles from the land in controversy; that all of section 31, township 53, range 5 west. was prairie land,

had no timber on it; that none of the land adjoining the land in controversy was inclosed in 1869, at the time of the sheriff's sale to plaintiff, the nearest fence to the land being one-fourth mile distant; did not know to whom the land lying immediately west of the land in controversy belonged in 1869; it was wild land and the owner unknown. In 1869, when the land in controversy was sold to plaintiff, it was bare prairie land, without fencing or improvements, and without timber or anything to designate it from other prairie lands, and was not known in the community by any particular description or designation; was not known by the description of "eighty acres, a part of the west half of section 31, township 53, range 5." Witness had known the land since 1862, when he sold it to Crow; the land lies south of the land sold by Crow to Thompson; was called the Crow land.

The plaintiff being examined, stated, that he bought the land under an execution against John B. Crow.

The location of this land was known in the community; it was south of the land sold by Crow to Thompson; Crow had eighty-three acres there; he knew the land and its location by reason of his having been with the surveyor several years ago when he surveyed the west half of said section 31 for Crow, and some lands in the neighborhood for plaintiff. The land was known by the community to be Crow's land before he bought it at sheriff's sale, and by some persons afterwards. The land was about eighteen or twenty miles distant from New London, the county seat, where it was sold. In the neighborhood of New London he did not know that anything was known about the locality of the land, or to whom it belonged. It was good land, was worth from eight to ten dollars per acre, and witness did not know whether Crow had other land in the neighborhood or not in 1869.

After the introduction of this parol evidence, the plaintiff again offered to read the said deed made by the sheriff to plaintiff, in which the land was described as being "eighty acres, a part of the west half of section 31, township 53, range 5."

The defendant again objected to the reading of said deed in evidence, on the ground that the description of the land was too vague. This objection was overruled by the court, and the deed read in evidence, to which he at the time excepted.

The defendant then introduced one Parker as a witness, whose evidence tended to prove, that he knew the land in controversy, and was well acquainted in the neighborhood where it was situate, and had lived in five or six miles of the land for thirty years; that the land was never known by the description of "eighty acres, a part of the west half of section thirty-one, township fifty-three, range five;" that John B. Crow owned other lands in two or three miles of the land in controversy at the time of the sheriff's sale to plaintiff.

The foregoing being all of the evidence in the cause, the court instructed the jury as follows:

"If the jury believe, from the evidence, that in the year 1863 John B. Crow was the owner of the west half of section 31, township 53, range 5 west, and that the said west half of said section contained 203 12-100 acres—that during that year the said Crow sold 120 acres off the north end of said west half of said section to one Robert W. Thompson, and retained the south part of said west half of said section; that the same was afterwards sold to the plaintiff by the sheriff of Ralls county under a judgment and execution against the said John B. Crow, then the plaintiff is entitled to recover in this action, although you may believe from the evidence, that the description in said sheriff's deed is vague and uncertain. Provided you shall further believe, from the evidence in the cause, that the land in controversy was known in the community where the sale took place by the description given in said, sheriff's deed, and that the exact location of said land was of public notoriety in said community."

The defendant objected to this instruction at the time, and, his objection being overruled, he excepted.

The defendant asked the court to instruct the jury, among other instructions, as follows:

"Before the plaintiff can recover the land in question, the

jury must believe from the testimony, that the land sued for was known in the community, in which it was situated, by the description given in the sheriff's deed to McPike, and, unless they believe that it was known by such description, they will find for the defendant."

"They are instructed, that on a petition in ejectment for the possession of a tract of land described in the petition as "eighty acres off the south end of the west half of section 31 township 53, range 5 west, they cannot find for the plaintiff on the evidence of a sheriff's deed for "eighty acres, part of the west half of section 31, township 53, range 5 west, unless they find from the other evidence, that the land was generally known in the community where it was sold by the particular description given in the deed."

These instructions were refused by the court, and the defendant excepted.

The jury then returned a verdict for the plaintiff.

The defendant in due time filed a motion to set aside the verdict and grant him a new trial, setting forth as grounds for the motion the opinions of the court excepted to, and that the verdict was against the law and the evidence. This motion being overruled, and final judgment rendered for the plaintiff, the defendant again excepted, and appealed to this court.

The questions presented by the record for the consideration of this court are: First, the objection of the defendant to the sufficiency of the sheriff's deed for the uncertainty in the description of the land; secondly, the objection of the defendant to the parol evidence offered to identify the land, and to make the description in the deed certain; and third, exceptions taken to the opinions of the court in giving and refusing instructions.

Similar questions, to those presented by the record in this case, have been before this court before, and it may now be considered as settled in this State, that parol evidence is admissible to identify the land vaguely described in a sheriff's deed, and show, that the land was well known by the description given; but it may be difficult to say exactly what and

how much parol evidence is required, but it seems to be admitted, that the parol evidence must show enough to satisfy the court, that the description given in the deed is sufficient to prevent persons from being misled as to the identity of the land sold, and to prevent a sacrifice of the property sold.

In the case of Hart vs. Rector, 7 Mo., 531, the description in the sheriff's deed was "three and one-half eighths of the Booneville tract, situate in Cooper county, on the south side of the Missouri river:" the deed was offered with this description, together with evidence, that the expression "Boonville tract" was at the time of the levy and sale and making of the deed well known, in the county of Cooper and neighborhood, to mean the northwest fractional quarter of section 35, township 49, range 17; and that said land had acquired the appellation of the "Boonville tract." This was held to be sufficient, the learned judge, delivering the opinion of the court, in his opinion remarked: "A sheriff has no right to sell land under execution, except such as he can describe with sufficient certainty so that purchasers may know what specific land is put up at auction, and where it lies. It is not necessary that the exact quantity of acres should be ascertained; nor would it be necessary to set it out by metes and bounds; but a reasonable degree of certainty is requisite, that the property of debtors may not be swept away under loose and indefinite executions and advertisements."

The next case, where the question under consideration was passed on by this court, was the case of Evans vs. Ashley, 8 Mo., 177. In that case the defendant had formerly owned twelve and a half arpents of land, adjoining the city of St. Louis, had sold it to another, who had laid the whole tract off into town lots with streets and alleys. After the land was thus laid out into town lots, six of the town lots, being only thirty feet wide each, were conveyed back to the defendant in the execution. The sheriff levied the execution on the interest of the defendant in the whole twelve and a half arpents, the defendant's deed to the six lots having never been recorded. The land was described in the advertisement, and in

the sheriff's deed, as the defendant's interest in the whole tract. This description was held to be insufficient, as no one could tell from the advertisement what interest was to be sold, and that the sheriff's deed, containing such description, conveyed no interest in the six lots owned by defendant.

The next case, where the same, or a somewhat similar question, was discussed, is the case of Landes vs. Perkins, 12 Mo., 238. In that case it seems, that a tract of land had been laid off into lots and blocks, but the whole tract still belonged to the defendant, and was described by the sheriff in the advertisement and deed as an entire tract of land, as it was situate before being laid out into lots, with some immaterial false descriptions.

The learned judge, who delivered the opinion of the court in that case, uses this language: "No error is seen in the refusal of the court to give the instructions relative to the appropriateness of the description of the lot, contained in the advertisement under which the sale was made to O'Fallon and Lindell. Clamorgan owned the whole lot, and the whole was sold. In this respect the case differs from that of Evans vs. Ashley. That the lot was sub-divided into streets and alleys; that it was sold in mass, and that a greater quantity was sold than was necessary to bring this case, so far as these objections are concerned, within the principle of the case of Hart vs. Rector, reported in the 7th Mo. Rep. It is there shown, that such irregularities in a sheriff's sale will avoid them in direct proceedings instituted to vacate them, but that they cannot be annulled collaterally. The authorities are there cited, and the argument made, and it is useless to repeat it here. Whether the description of the premises sold was sufficient would depend on extrinsic circumstances. If the lot was known by the description given, the sale would be valid, according to the principle settled in the case of Hart vs. Rector, 7 Mo., and parol evidence was admissible to establish that fact."

The same question was again brought before this court in the case of Bates vs. The Bank of Missouri, (15 Mo.,

309), where the case of Hart vs. Rector is approved, the court holding that, "however vague a description of the land sold under execution a sheriff's deed might contain, yet parol evidence is admissible to identify the premises, and show that in the community, in which the sale took place, they are known by the description given. The object of a description is to prevent imposition and a sacrifice of the property. If the subject of the sale is described so as to prevent these consequences, the law is satisfied."

In the case of Clemens vs. Rannells, 34 Mo., 579, the description in the sheriff's deed was, "all the right, title, interest, estate and property of him, the said James Mackay, deceased, of, in and to a tract of land situate about six miles northwestwardly from the city of St. Louis, on the River des Peres, containing fifteen hundred arpents, more or less, being a part of a tract of eighteen hundred arpents, granted to James McDaniel on the first day of February, in the year one thousand seven hundred and ninety-eight, by Don Zenon Trudeau, which said tract adjoins lands which were granted to Mary L. Papin."

There being no parol evidence which made the description appear any more certain, and no evidence to show that any particular tract of land was known by the description given, or that tended to locate the lands described in any particular part of the larger tract referred to in the description given, the description was held to be too vague, and the deed therefore void.

The only remaining case, in which the question being considered was passed on by this court, is the case of Webster vs. Blount, (39 Mo., 500.) In that case the land was sold by the sheriff as the land of one Shrock, and described as being "110 acres, part of the northwest quarter of section No. 26, township 59 of range 34."

It will be seen, that this description is almost exactly such a description as the description in the sheriff's deed offered in evidence on the trial of the case now being considered. In the Webster vs. Blount case, parol evidence was given, by which

it was proved by persons living in the neighborhood of the land, that the defendant in the execution (Shrock) had resided on the land for a number of years; and that the exact location of the one hundred and ten acres of the section named was of public notoriety. This was held to be sufficient, and the sheriff's deed was held to be valid. The learned Judge, delivering the opinion of the court in that case, used this language: "It has been repeatedly decided by this court, and must be considered as settled, that, however vague the description of the land, sold under execution, in a sheriff's deed may be, parol evidence is admissible to identify the premises, and show, that in the community, where the sale took place, the land was well known by the description given."

I have briefly referred to all of the cases I have been able to find in the reports of this State where the subject has been considered; by which it will be seen, that it is well settled in this State, that parol evidence is admissible to identify the land sold, and give certainty to a vague description in a sheriff's deed. It will also be seen that no certain or definite rule has been laid down, and perhaps none can be laid down, which will be applicable to all cases, in reference to the kind and amount of parol evidence required to produce certainty in each particular case; but each case must be governed by the circumstances surrounding it. It would evidently be more satisfactory where the description is so vague as it is in the case now being considered, that the parol evidence should prove some physical facts which are accessible to all, by which the land can be identified when taken in connection with the description given, or that the land has acquired an appellation or name by which it is generally known, as in the case of Hart vs. Rector; but it seems from the cases that no rule has been adopted on the subject. In the case last referred to, Webster vs. Blount, the description was no more certain than it is in the present case. The evidence showed that Shrock lived on the land, and it was well known in the neighborhood. In the present case the parol evidence tends to show that the land is prairie land, and the land all around and

adjoining the land sold was open prairie land; that it is known in the community as the land of Crow; that Crow owned no other land in the immediate neighborhood of the land sold, and that it was generally known, that he had sold the north hundred and twenty acres of the half section described, and that he owned no land in the half section but the eighty-three acres on the south end thereof; so that it would be difficult to distinguish this case from the case of Webster vs. Blount. The only difference is, that in that case Shrock lived on the land. It must be admitted, that if this prairie land had been described by its legal sub-division as described in the government surveys, it would be difficult to identify it by that description without an actual survey, and then in such case the purchaser will have to resort to the reputation in the neighborhood, or inquire of those who actually knew the land, to have it identified, and it is not questioned that such description would be good. We think that the case was fairly presented to the jury by the instruction given by the court, and they have found for the plaintiff. It is true, that the evidence only tended to prove that the land was known in the community where situate, and the instruction tells the jury the land must be known where it was sold; but it is not thought that this could have prejudiced the defendant; and there being no evidence to show that there was any sacrifice of the land, we will not disturb the verdict.

It is not meant to be understood, that inadequacy of price alone would render the sale void, but if the price paid for the land was grossly inadequate, that fact might be taken in connection with other circumstances to show, in a well-balanced case, that the public had been misled by the description.

The judgment will be affirmed. The other Judges concur.

JERRY B. CLARKSON, Respondent, *vs.* WILLIAM BUCHANAN, Appellant.

1. *Swamp lands—Patent—Act Sept. 28th, 1850—Effect of—Secretary of the Interior—Parol evidence identifying land.*—The Act of Congress of September 28th 1850, to enable the State of Arkansas and other States to reclaim the swamp lands within their limits (9 U. S. Stat., 519,) constituted a present grant, vesting an absolute title *proprio vigore* in the State of Missouri to such lands within her limits without issue of patent. The failure of the Secretary of the Interior to afterward perform his duty, in making out the lists and plats of the lands, and transmitting them to the governor, did not in any wise interfere with, or impair, the title. And in ejectment for such land, parol evidence is admissible for the purpose of identifying the same, as, in fact, swamp and overflowed land.
2. *Swamp lands—List of, in office of Register of lands—Effect of, as evidence.*—A list of the swamp lands, certified from the office of the Register of lands, is presumptive evidence that the list is a legal and correct one.

*Appeal from Macon Circuit Court.*

*James Carr*, for Appellant.

I. The act of September 28th, 1850, (9 U. S. Stat., 519,) did not pass the title in fee to said States, *proprio vigore* and unconditionally, for want of words of present grant. The words in the first section are "*shall be*," and same are hereby, granted to said State. The words "shall be" import futurity within themselves. But when construed in connection with the following words in the second section of said act, there can be no doubt about it, viz: "It shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the Governor of the State of Arkansas, and, at the request of said Governor, cause a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof."

II. The overture is complete on the part of the United States, when this "duty" shall have been performed. But the title is not thereby divested out of the United States. It is then left to the Governor of the State, as its legal head and representative, to determine whether he will, on behalf

of the State, accept the lands embraced in said "list and plats." Unless he accepts there is no agreement, and no contract is made.

III. There is no evidence in the record; that the land in controversy was ever selected by any agent of Macon county, as swamp or overflowed land; that it was ever reported to the Commissioner of the General Land Office; or, that "an accurate list and plats" of said land was ever made out by the Secretary of the Interior, and the same transmitted to the Governor of the State; or that, "at the request of said Governor," "a patent" had been "issued to the State therefor."

IV. The United States could not compel the States to accept said lands; and without acceptance the grant is necessarily void. (Ellis vs. Marshall, 2 Mass., 277; 1 Kyd. on Corp., 65, 66; Ang. and A. on Corp., § 82; Dartmouth College vs. Woodward, 4 Wheat., 518.)

So thoroughly has the Federal Government acted upon the assumption, that a grant of lands to a State is a contract not binding upon such State until accepted, that it has always required the State to accept such grant in some positive unequivocal manner. See the Act of April 30th, 1802, providing for the admission of Ohio into the Union, (§ 7, Chap. 40, 2 vol. U. S. Stat., 175), the Act of April 19th, 1816, providing for the admission of Indiana into the Union, (§ 6, Chap. 57, 3 vol. *Id.* 290), the Act of April 18th, 1818, providing for the admission of Illinois into the Union, (§ 6, Chap. 673, *Id.* 430), and the ordinance of July 13th, 1787, (1 vol. *Id.* 51).

V. Admitting for the sake of argument, that the State did accept the donation of the swamp and overflowed lands, as required by the act of September 28th, 1850, before the definite location of the line or route of the Hannibal and St. Joseph Railroad, still such acceptance would only entitle her to such lands as come within the purview of the said act. Her claim would be in the nature of "a float" (Menard's heirs vs. Massey, 8 How., 309), until the Secretary of the Interior had made out "an accurate list and plats of said lands." Then

the State would have had a *jus ad rem* to the lands embraced in said "list and plats." This inchoate title might then have become a *jus in re* by issuing a patent therefor. But prior to the Secretary of the Interior making out such "list and plats," no person knew what lands were swamp and overflowed within the purview of the law. At common law, the grant would be void for uncertainty. (Buyck vs. United States, 15 Pet., 223; United States vs. Forbes, *Id.*, 173; 4 Bacon Ab. Tit. Grant, 81; United States vs. Miranda, 16 Pet., 160.)

*William H. Sears & Albert F. Foster*, for Respondent.

I. The plaintiff founded his title to the land in question on the Act of Congress approved September 28th, 1850, entitled "an Act to enable the State of Arkansas and other States to reclaim the swamp land within their limits." And that act was by its terms a present absolute grant to the several States of all the swamp land lying therein, belonging to the United States at the time of the grant. (9 Stat. at Large, 519, § 1; Han. & St. Jo. R. R. Co. vs. Smith, 9 Wal., 95.)

II. It was a grant in the form of law, describing the subject of the grant by its quality instead of by its quantity, or metes and bounds, which is a sufficiently specific and certain description to make the grant operative as a present absolute grant. (3 Washb. Real Prop., 354, (3rd Ed.); 1 Greenl. Ev., § 287; Worthington vs. Hylyer, 4 Mass., 204; Melvin vs. Proprietors, &c., 5 Metc., 28; Morse vs. Marshall, 11 Allen, 230; Lessee of Barton vs. Heirs of Morris, 15 Ohio, 408; Lodge's Lessee vs. Lee, 6 Cranch., U. S., 237.)

III. Wherever in a grant of land the description is such, that the land intended to be conveyed can be ascertained by it, it is then sufficiently specific and certain to give effect to the grant. (See cases cited in § 2, *supra*; also, 3 Washb. Real Prop., 344; Peck vs. Mallams, 10 N. Y., 532; Jackson vs. Marsh, 6 Cow., 281; Comm. vs. City of Roxbury, 9 Gray, 451.)

IV. The grant should therefore be treated as a present absolute grant, even though the act does provide for the issuing

of a patent by the Secretary of the Interior; for, where land is granted by Congress, or a State legislature, and the same act authorizes the issuing of a patent, a patent is not necessary to show a good title. (Fenwick vs. Gill, 38 Mo., 510; Wilcox vs. Jackson, 13 Pet., 516.)

V. And parol evidence was properly admitted for the purpose of preventing the grant of Congress from becoming inoperative for uncertainty, to bring it within the grant, and to identify the land granted. (3 Washb. Real Prop., 347, 349, 363; 1 Greenl. Ev., §§ 286, 287 and note; Gerrish vs. Towne, 3 Gray, 82; Woods vs. Lawin, 4 Gray, 322; Stone vs. Clark, 1 Metc., 381; Craft vs. Hibbard, 4 Metc., 452; Waterman vs. Johnson, 13 Pick., 261; Frost vs. Spaulding, 19 Pick., 445; Clark vs. Munyan, 22 Pick., 410; Pettit vs. Shepard, 32 N. Y., 97; Lessee of Barton vs. Heirs of Morris, 15 Ohio, 408; Hildebrand vs. Fogle, 20 Ohio, 147; Han. & St. Jo. R. R. Co. vs. Smith, 9 Wall., 95.)

VI. The second section of the act of Congress in question, so far as it relates to the selecting of the swamp land, making out list and plats of the same, and issuing patents therefor, is merely directory; and it is not intended to, in any manner, limit nor restrict the words of present, absolute grant, expressed in the first section. (Sedg. on Stat. and Const. Law, 368, and cases there cited; 9 U. S. Stat., 519, § 2.)

VII. The land in question, being in fact swamp land in 1850, having been selected, placed in the list of swamp land lying in Macon county, and having been transmitted to the Governor as such, and being included in the list of swamp land on file in the office of the Register of lands, the State was entitled to a patent for the same. Hence the failure to obtain such patent can amount to nothing more than a technical defect in the plaintiff's title, of which the defendant in this case cannot take advantage. (Tyler on Eject. and Adv. Enjoy., 74; McAlistor vs. Williams, 1 Turn., 334; Zeringue vs. Williams, 15 La. An., 76.)

VIII. The plaintiff produced in evidence a certified copy of the list of swamp land on file in the office of the Register

of Lands, which list embraces the land in question. The statute of this State makes such lists, or certified copies thereof, *prima facie* evidence of title in Macon county, and the plaintiff, being the grantor of Macon county, made out a *prima facie* case. (W. S., 868, § 9.)

WAGNER, Judge, delivered the opinion of the court.

This was an action of ejectment to recover the possession of a tract of land in Macon county containing forty acres.

The petition was in the usual form, and the answer was a simple denial, raising the general issues. The plaintiff to show title in himself, read in evidence:

First—An act of Congress, approved September 28th, 1850, entitled "An act to enable the State of Arkansas, and other States, to reclaim the swamp lands within their limits."

Second—The act of the General Assembly of the State of Missouri, entitled "An act donating certain swamp and overflowed land to the counties in which they lie;" approved March 3d, 1851.

Third—A deed to the land in question from Macon county, executed by the Swamp Land Commissioner of that county.

Fourth—A certified copy of the list of swamp land selected in Macon county, on file in the office of the Register of Lands, which list embraced the land in controversy.

The plaintiff, further to maintain his title, proved by the testimony of witnesses, that they knew the land in 1850; that it was swamp land subject to overflow and was unfit for cultivation. This last evidence was objected to by the defendant, but the objection was overruled.

The defendant held possession by purchase from the Hannibal & St. Joseph Railroad Company, and, to show that plaintiff had no legal title, he offered in evidence; an act of Congress, approved June 10th, 1852, entitled "An act granting the right of way to the State of Missouri and a portion of the public lands to aid in the construction of certain railroads in said State;" an act of the General Assembly of the State of Missouri, approved September 20th, 1852, entitled "An

act to accept a grant of land made to the State of Missouri by the Congress of the United States, to aid in the construction of certain railroads in this State, and to apply a portion thereof to the Hannibal & St. Joseph Railroad;" a copy of the resolutions of the Board of Directors of the Hannibal & St. Joseph Railroad Company, adopted March 7th, 1853, accepting the grant of land made to the State of Missouri by the Congress of the United States; an exemplified copy of the map of the definite location and route of the Hannibal & St. Joseph Railroad, from the City of Hannibal to the City of St. Joseph, Missouri, with a line on the same denoting the line of said road, and with lines and figures designating the sections, townships and ranges; also evidence showing, that the Hannibal & St. Joseph Railroad was completed in February, 1859, and that the land in question was within six miles of the road.

A list of lands was produced and given in evidence, which were approved to the Hannibal & St. Joseph Railroad Company by the Commissioner of the General Land Office, which list embraced the land in question, and also a list of said lands filed for record in the Recorder's office of Macon county.

The above constituted the evidence in the cause, and upon which the court declared the law to be, that if the land in controversy was swamp and overflowed land on the 28th of September, 1850, and unfit for cultivation, and the same was selected by Macon county as swamp and overflowed land, and was embraced in the list of swamp land in said county transmitted to the Governor of the State of Missouri, and by him filed in the office of the Register of Lands, under the act of Congress of September 28th, 1850, then the title, on the transmission of said lists and plats by the Secretary of the Interior to the Governor of the State, and by an act of the General Assembly of March 3d, 1851, vested in Macon county.

The court refused all the instructions offered by the defendant.

The first one was predicated on the ground, and asserted

the proposition, that no title accrued to the State for swamp or overflowed land till a patent was issued therefor.

The others declared, that the title to the land vested in the Hannibal & St. Joseph Railroad Company, provided the company had complied with certain conditions embraced within the acts above alluded to.

There was a verdict and judgment for plaintiff.

The several acts of Congress, together with the acts of the State Legislature, touching the subject matter of this suit, are set out in the statement of the case in Hannibal & St. Joseph Railroad Co. vs. Smith (41 Mo., 310), and need not be here copied in this opinion.

It is obvious, that the main question, which underlies this whole controversy and which must decide it, is, whether under the act of September 28th, 1850, a patent was necessary and requisite to the vesting of a title to the swamp and overflowed lands in the State.

If the act was a direct grant, and vested the title by its own terms, then the subsequent act of June 10th, 1852, donating lands for railroad purposes, did not include or operate on the lands previously granted.

In the Hannibal & St. Joseph Railroad Co. vs. Smith, *ubi supra*, where a cognate question was presented, it was held, that the act of Congress of September 28th, 1850, to enable the State of Arkansas and other States to reclaim the swamp land within their limits, operated as a reservation upon the grant of land made to the State of Missouri for the construction of the railroads described in the act of Congress of June 10th, 1852, and, that in a suit of ejectment brought by the railroad corporation claiming title under said act, parol evidence was admissible to prove, that the land sued for was swamp and overflowed land, made thereby unfit for cultivation so as to bring such land within the terms of the grant or reservation made by the act of September 28th, 1850, although the lists and plats to be made by the Secretary of the Interior, provided for in the act, had not been made and transmitted to the Governor, and no patents had issued.

The case referred to was appealed to the Supreme Court of the United States, where the judgment of this court was affirmed. (See Hannibal & St. Joseph R. R. Co. vs. Smith, 9 Wall., 95.)

It was declared in the United States Supreme Court, that the act concerning swamp and overflowed lands confirmed a present vested right to such lands, though the subsequent identification of them was a duty imposed upon the Secretary of the Interior, and that these lands were excepted from the subsequent railroad grants.

Mr. Justice Miller, who wrote the opinion of the court, says: "The first section of the act, after declaring the inducements to its passage, says, that the whole of these swamp and overflowed lands, made thereby unfit for cultivation, and unsold, are hereby granted to the States. * * * *

By the second section of the act of 1850, it was made the duty of the Secretary of the Interior to ascertain this fact, and furnish the State with the evidence of it. Must the State lose the land, though clearly swamp land, because that officer has neglected to do this? The right of the State did not depend on his action, but on the act of Congress, and though the States might be embarrassed in the assertion of this right by the delay or failure of the Secretary to ascertain and make out lists of these lands, the right of the States to them could not be defeated by that delay. As that officer had no satisfactory evidence under his control to enable him to make out these lists, as is abundantly shown by the correspondence of the land department with the State officers, he must, if he had attempted it, rely, as he did in many cases, on witnesses whose personal knowledge enabled them to report as to the character of the tracts claimed to be swamp and overflowed. Why should not the same kind of testimony, subjected to cross examination, be competent, when the issue is made in a court of justice, to show that they are swamp and overflowed, and so excluded from the grant under which plaintiff claims; a grant which was also a gratuity?

The matter to be shown is one of observation and examin-

ation, and whether arising before the Secretary, whose duty it was primarily to decide it, or before the court, whose duty it became because the Secretary had failed to do it, this was clearly the best evidence to be had, and was sufficient for the purpose. Any other rule results in this, that because the Secretary of the Interior has failed to discharge his duty in certifying these lands to the States, they, therefore, pass under a grant from which they are excepted beyond a doubt; and this, when it can be proved by testimony capable of producing the fullest conviction, that they were of the class excluded from plaintiff's grant."

The above case is conclusive authority, that the swamp land act constituted a present grant, vesting an absolute title in the States that were entitled to them; that the failure of the Secretary of the Interior to afterwards perform his duty did not in anywise interfere with or impair the title, and that parol evidence was admissible for the purpose of identifying the subject matter of the grant. But the defendant further insists, and his third instruction was asked on that point, that as the action is ejectment and plaintiff must recover on the strength of his own title, he must show, that in accordance with the law the Secretary of the Interior had made out an accurate list and plat of the swamp lands, including the land in controversy. The plaintiff produced in evidence a list of the swamp lands in Macon county, certified from the office of the Register of Lands, embracing this tract, and that was *prima facie* evidence. The presumption is, that the list was legally and correctly there. The same evidence was acted upon in the case of Railroad Co. vs. Fremont county (9 Wall, 89), and was adjudged sufficient. There the county was the actor, and the only evidence of title to the swamp lands in the county was the lists filed in the land office, and this was held sufficient to enable the county to maintain its suit. I see no distinction in this respect between the two cases.

I am of the opinion that the judgment should be affirmed; all the Judges concur, except Judge Adams who is absent.

SOUTHERN HOTEL CO., Plaintiff in Error, *vs.* GABRIEL S. CHOUTEAU, Defendant in Error.

1. *Contracts—Subscription, suit upon—Agency—Qui facit, etc.*—A subscription paper embodied the following clause: "The undersigned agree to pay to A. B., the sums set opposite our names as a 'bonus' to induce him to complete the Southern Hotel in such manner as may be determined by the directors of the company, and A. B." In suit by the assignee of the paper against a signer, for the amount of his subscription; *held* no defense to the suit, that A. B. by payment of a certain sum procured the work to be done by others.

*Error to St. Louis Circuit Court.*

*A. J. P. Garesche*, for Plaintiff in Error.

*T. T. Gantt*, for Defendant in Error.

WAGNER, Judge, delivered the opinion of the court.

This was an action brought to recover of defendant a subscription, made by him in conjunction with several others, to secure the completion of the building of the Southern Hotel.

The petition in substance alleges, that defendant, by his agreement to secure the completion of the Southern Hotel, stipulated and agreed to pay James H. Lucas one thousand dollars as a bonus, to induce him to undertake the completion of this hotel in such manner as might be determined by the Board of Directors of the hotel and said Lucas, the completion being regarded as a great public improvement, redounding to the interest of St. Louis capitalists, of which class defendant was one. There is, then, an averment that Lucas thereupon entered into an agreement with the Board of Directors of the hotel company, whereby Lucas secured the completion of the hotel, and in accordance therewith, the same was built and finished, and Lucas assigned to plaintiff the said sum of $1,000 subscribed by defendant.

The answer admits, that defendant made a subscription of $1,000 as a bonus to induce James H. Lucas to undertake the completion of the Southern Hotel in St. Louis, but says, that Lucas never did undertake the completion of the hotel, and was never induced by the subscription of the defendant to undertake the same, and that, on the contrary thereof, after entering into some negotiations with the plaintiff having

reference to the undertaking, he wholly abandoned and gave up all intention and purpose of undertaking the completion of the same, and, with the consent of the plaintiff, turned over to other persons all the unfinished contracts and negotiations then pending between him and the hotel company, all of which was done without the consent or approval of defendant, who was no party to the abandonment and surrender of the completion by Lucas.

The replication denied, that Lucas abandoned the completion of the building, or that the assignment by him was without the consent or approval of the defendant.

At the trial, the plaintiff introduced in evidence a subscription paper signed by the defendant, with others, wherein it is stated: "We, the undersigned, agree to pay James H. Lucas the amount set opposite our names, as a bonus to induce him to undertake the completion of the Southern Hotel, in such manner as may be determined by the Board of Directors and Mr. Lucas." The assignment of the subscription paper was then given in evidence, which, after reciting its terms, continued: "Whereas, divers persons have heretofore subscribed various sums of money to a paper or papers, in substance such as that above written, and whereas, I, James H. Lucas, have, with the consent of, and through the Board of Directors of the Southern Hotel company of St. Louis, entered into an arrangement, whereby the said Southern Hotel is to be erected and completed by Thornton Grimsley, J. A. Brownlee, George Knapp & Co., Henry T. Blow, John J. Anderson, Charles McLaren, Robt. K. Woods, B. M. Runyan, Belt & Priest and Taylor Blow, to secure which arrangement I have paid the sum of eleven thousand dollars; and whereas, under said arrangement, the said company is to receive the moneys so subscribed as aforesaid. Now, therefore, in consideration of the premises, I do hereby assign, transfer and set over to the said Southern Hotel Company, of St. Louis, the said subscription paper or papers, and all sums of money thereto subscribed, and all my right, title and interest therein.

Witness my hand this 5th day of June, 1860.

JAMES H. LUCAS."

This was all the evidence introduced by the plaintiff; whereupon, at the instance of the defendant, the court gave an instruction that the plaintiff could not recover. Plaintiff then took a non-suit, with leave to move to set the same aside, which motion was made and overruled, and the case comes here by appeal.

It is admitted by the pleadings, that the subscription was made to induce Lucas to undertake the completion of the hotel, and that, under the arrangement, the same was completed. The subscription was signed, and the obligation entered into, to induce Lucas to undertake the completion in such manner as might be determined upon between himself and the Board of Directors. Was it necessary, under the terms of this agreement, that Lucas should personally engage in the matter of completing the building, or would it be satisfied by his making an arrangement by which the same end would be accomplished or secured? If it was a mere personal confidence reposed in Lucas, then certainly the defendant would not be bound. But if the main object to be accomplished was completing the building, and Lucas was applied to as the most effective and reliable agent to consummate that end, then we think the determination should be otherwise.

A fair and reasonable interpretation of the contract does not require that the work should be done under the personal control or supervision of Lucas. It is to induce him to undertake the completion of the hotel in such manner as might be determined upon between him and the Board of Directors. The object was, that he should confer with the Board, and institute the agencies and organize the means by which the desired end should be accomplished. In pursuance of the work contemplated, in a conference, with and through the consent of the Board of Directors, he made an arrangement with several gentlemen to erect and complete the hotel, and turned over to them the subscription list, and also paid $11,000 to aid in the enterprise. Under the auspices of the persons, who entered into the arrangement with Lucas, the hotel was completed. In fact, it may be said that Lucas did undertake the

completion. Through his agency and management, and by the aid of his money, together with that which was pledged to him, he secured the desired and principal object in view. He did not let out the contracts in his own name, nor did he personally superintend the work as it progressed, and we do not think that was necessary. But he was instrumental in having the building erected and completed, and that was the object sought by those who signed the subscription paper.

We are therefore of the opinion, that the court erred in its ruling, and the judgment should be reversed and the cause remanded, the other Judges concurring.

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JAMES ELLISON, Sen., Respondent, *vs.* ELIZABETH MARTIN, *et al.*, Appellants.

1. *Practice, civil—Publication—Non-appearance—General judgment.*—General judgments cannot be rendered against a defendant merely upon order of publication, and not followed by appearance of defendant.
2. *Practice, civil—Actions in rem—Divorce.*—A divorce suit is a suit *in rem*, and the *res* is the status of the plaintiff in relation to the defendant.
3. *Practice, civil—Publication—Non-Appearance—Divorce—Judgment in rem—Query.*—Whether in a divorce suit by publication, not followed by appearance, property can be brought before the court by describing it in the petition, and demanding a judgment *in rem* for alimony?

*Appeal from Adair Circuit Court.*

*DeFrance & Halliburton*, for Appellants.

I. On a notice by publication, a general judgment cannot be taken against a defendant who does not appear to the action. (Smith vs. McCutchen, 38 Mo., 415; Latimer vs. U. P. R. R. E. D., 43 Mo., 105; Fithian vs. Monks, 43 Mo., 502; Abbott vs. Sheppard, 44 Mo., 273.)

II. The sections of the statute, which provide for alimony and maintenance, contemplate a case where the defendant is in court by personal service or appearance. (W. S., 1008, § 13; 534, § 6; 535, § 13; 533, § 2.)

III. Where a party commences a suit against a non-resident defendant in which he wishes a judgment for money, and gives notice by publication, he must state the amount claimed in the publication; if he does not, the judgment will be void. (W. S., 1008, § 13; Haywood vs. Russell, 44 Mo., 252, and cases cited.)

*Ellison & Ellison*, for Respondent.

I. Alimony is an incident to a divorce suit. (2 Bish. on Mar. and Div., side p. 488.)

The court necessarily has the power to grant alimony, whenever it has the power to grant a divorce.

II. The woman is compelled to sue for a divorce where her home is at the time. (W. S., 533, § 2.)

The husband might abandon her, leave property, and be abundantly able to support her; and yet, if the appellant's position be true, she should starve and suffer amidst an abundance, because the husband had purposely gone beyond the reach of a summons.

It seems then naturally to follow from the very necessity of the thing, that alimony can be allowed on notice by publication. Again, a court in granting alimony does not do so by a regular judgment as in other cases, but simply gives it by order and as an incident to the main proceeding. (W. S., 534, § 6; 2 Bish., Mar. and Div., (4th Ed.) side p. 488; Lawson vs. Shotwell, 27 Miss., 630; Jones vs. Jones, 18 Maine, 308; 2 Story Eq., Jurisp., 908, (top p., 6 Ed.)

These cases from Mississippi and Maine show, that if the court has the right to grant the divorce, it in consequence has the right to give alimony. By section 6 (W. S., 534,) the court is authorized to give maintenance during suit.

III. The statute clearly indicates alimony should be granted. No petition for a review of any judgment of divorce shall be allowable; but there may be a review of any order touching the alimony as in other cases. (W. S., 535, § 11.)

IV. The husband's property, made so by his reducing it to possession before any divorce suit, can be divested out of him.

(W. S., 535, §§ 8, 9.) Could it be contended, that none of this could be done by order of publication?

ADAMS, Judge, delivered the opinion of the court.

This was a partition case, which resulted in a judgment for the sale of the lands for the purpose of division of the proceeds among the parties according to their respective interests therein as adjudged by the court.

The lands are situated in Adair county, and belonged to Rolla Martin, who died intestate, leaving seven heirs at law entitled to these lands, one of whom was Franklin, alias French Martin.

Parmelia Martin was the wife of French Martin, and instituted a suit for a divorce against him in the Lewis Circuit Court. In her petition for a divorce she alleged, that her husband, French Martin, was the owner of eighty acres of land in Adair County, but did not describe the land; she asked for alimony during the pendency of the suit, and for a final judgment for alimony, but did not demand any judgment against the land itself. The said French Martin was a non-resident of this State, and was proceeded against as such in the divorce suit by order of publication. He made no appearance, and a judgment by default was rendered against him, which was made final at a subsequent term. And at the time it was made final, the court also rendered a personal general judgment against him for two hundred dollars for alimony, and ordered execution to be issued thereon. An execution was issued on this general judgment, in favor of the wife, to the sheriff of Adair county, and levied on French Martin's interest in the land in dispute, and the sheriff sold such interest, and the plaintiff bought the same, and took the sheriff's deed therefor.

The only title set up by the plaintiff is predicated on this sheriff's deed.

The court held, that it conveyed to the plaintiff French Martin's interest in the premises, and that the plaintiff was entitled to one-seventh part of the lands or their proceeds.

From this judgment the defendants have appealed to this court.

Several instructions were asked by the defendants, and refused by the court. And also an instruction at the instance of the plaintiff was given. None of the instructions fairly present the only point necessary to consider, and it is therefore unnecessary to set them out, or to comment on them.

It is manifest from the only evidence relied on by plaintiff, that he had no standing in court. He stood alone upon the sheriff's deed. If the judgment for alimony was void, the sheriff's deed was also void.

Our laws do not allow general judgments to be rendered against parties merely on publication of notice, and without appearance of the defendant. The Legislature never contemplated that such judgments might be given. (Smith vs. McCutchen, 38 Mo., 415.)

A judgment on order of publication can only be given in proceedings *in rem*.

A divorce suit is a proceeding *in rem*, and the *res* is the *status* of the plaintiff in relation to the defendant, to be acted on by the court. This relation being before the court in the person of the plaintiff, the court acts on it, and dissolves it by a judgment of divorce. But there was nothing before the court to act on in regard to alimony in this case.

Whether property can be brought before the court by describing it in the petition, and demanding a judgment *in rem* for alimony, is a question we are not now called upon to decide.

This judgment was a general judgment *in personam*, and such judgments cannot be rendered in this State merely on publication of notice.

Under this view, the judgment must be reversed and the cause remanded. The other Judges concur.

GEORGE F. DOUGHERTY, Plaintiff in Error, *vs.* THE PRESIDENT AND FACULTY OF ST. VINCENT'S COLLEGE, Defendant in Error.

1. *Practice, civil—Judgment made final at return term on bill in chancery, may be set aside at next term, when.*—In counties where there are only forty thousand inhabitants, or the number is less, a judgment on a bill in chancery rendered for want of answer, and made final at the same time, may be set aside at a subsequent term; and the court may in the exercise of a sound discretion permit the defendant to plead over.

*Error to Cape Girardeau Circuit Court.*

*Lewis Brown, with Kitchen, Tyrrell & McGinnis*, for Plaintiff in Error.

I. Nothing is better settled in this State, than that, after the term at which a final judgment is rendered, the court cannot interfere with it. (Ashley vs. Glasgow, 7 Mo., 320; Hill vs. St. Louis, 20 Mo., 584; Brewer vs. Dinwiddie, 25 Mo., 351; Stacker vs. Cooper Circuit, *Id.*, 403; Deickhart vs. Rutger, 45 Mo., 135; Dilworth vs. Rice, 48 Mo., 124; Winston vs. Affalter, 49 Mo., 263; Martin vs. McLean, *Id.*, 362; Saxton vs. Smith, 50 Mo., 490.)

In Reed vs. Hansard, (37 Mo., 199,) this court says: "There must be some substantial ground of relief, which will bring the case under some head of equitable jurisdiction, such as fraud of the opposite party, uncontrollable accident or mistake, unmixed with negligence or fault on his own part. * * * * * * It is clearly not a case of accident or mistake, unmixed with fault or negligence on their part, and in this respect no difference can be made between the parties and their attorneys," *etc. q. v.* (Matthews vs. Cook, 35 Mo., 286; O'Conner vs. Duff, 30 Mo., 595; Florenz vs. Uhrig, 35 Mo., 517; Gra. and Wat., N. T., 963; Peers vs. Davis, 29 Mo., 184; Waddell vs. Wood, 64 N. C., 624; Miller vs. Bernecker, 46 Mo., 194; Elliott vs. Shaw, 16 Cal., 377; Patchin vs. Wegman, 19 Mo., 151; Sto. Eq., § 895–6; Matson vs. Field, 10 Mo., 100.)

II. The court must be satisfied from the facts stated in the motion, supported by the evidence, "that an improper ver-

dict or finding was occasioned by such matters, and that the party had a just cause of action or defense." (2 W. S., 1058, § 3; O'Conner vs. Duff, 30 Mo., 595; Sto. Eq. Pl., (7th Ed.,) §§ 251, *a.*, 252, 253; Barry vs. Johnson, 3 Mo., 372; Lamb vs. Nelson, 34 Mo., 501; Bosbyshell vs. Summers, 40 Mo., 172; Tidd's Pr., (4 Am. Ed.,) side page 568; Green vs. Goodloe, 7 Mo., 26; Campbell vs. Garton, 29 Mo., 343; Lecompte vs. Walsh, 4 Mo., 557.)

*A. J. P. Garesche, with Louis Houck*, for Defendant in Error.

I. The judgment, even if final, may for mistake, fraud or surprise, be set aside at a subsequent term, and it may be done by a motion. (Kemp vs. Cook, 18 Md., 138; Yates vs. Horanson, 7 Rob., (N. Y.,) 12; Hill vs. Northrop, 9 How. Pr., 527; Cooley vs. Gregory, 16 Wis., 305; Miles vs. Jones, 28 Mo., 87; Spalding vs. Meier, 40 Mo., 176; Downing vs. Still, 43 Mo., 309; Bernecker vs. Miller, 44 Mo., 102.)

Adams, Judge, delivered the opinion of the court.

This was an action in the nature of a bill in chancery to set aside and annul certain deeds set forth in the petition.

The summons was returnable to the November term, 1872, of the Circuit Court. The defendant by its attorney acknowledged, in writing on the writ, service of the same. Owing to some correspondence which was had between the attorneys for the respective parties, the defendant failed to appear or file answer, or otherwise plead to the petition, at the return term, and the plaintiff took a judgment for want of answer, and had it made final at the time of entering the interlocutory judgment.

At the next term of the court, the defendant appeared by its attorney, and filed a motion to set aside the judgment which had been taken at the November term, and for leave to plead. Several grounds were set forth in the motion, but it is unnecessary to notice them, as the only point now before us is, whether the court could act at all upon this motion af-

ter the end of the return term, at which the judgment was made final.

The court entertained the motion, and set aside the judgment, and the defendant filed a demurrer to plaintiff's petition. When the demurrer was called for hearing, the plaintiff objected to all the proceedings in the premises, and announced to the court, that he would stand on his judgment as rendered at the November term, 1872; that he would not prosecute the case any further, because the court had no jurisdiction to interfere with the judgment rendered in his favor. Upon this announcement being made, the court dismissed the plaintiff's petition for want of prosecution, to which the plaintiff excepted, and has brought the case here by writ of error.

Our code of practice does not authorize a judgment for want of an answer to be made final at the return term of the summons in this class of cases, without the consent of the defendant in counties of forty thousand inhabitants, or less. Where the suit is founded upon a written instrument, or upon a judgment of a court of record, and the demand is ascertained by such instrument, or the record of such judgment, or where the suit is upon an open account, or account stated, and the items of the account are set forth in, or annexed to, the petition, and the defendant be personally served by delivering to him a copy, a final judgment may be rendered against him at the time of entering his default at the return term. (See 2 W. S., 1053, §§ 9, 10.) But in all other cases not provided for in the preceding sections, in those counties where there are only forty thousand inhabitants, or less, an interlocutory judgment, taken at the return term, cannot be made final at that term, but, when taken at the next or any subsequent term, it may be made final at the time it is rendered. (2 W. S., 1053, § 11; 1014, § 5; 1039, § 5.) The three sections above referred to must be read together to ascertain the intention of the Legislature, and, when so read, it will be manifest that a judgment by default, *nil dicit*, or for want of answer, in the class of cases under consid-

eration, rendered at the return term, cannot be made final at the time the default is taken. Under this view the judgment, which was rendered against the defendant at the November term, 1872, was irregular, and the court had the power at a subsequent term to set it aside.

The court might have simply set aside the final judgment, and left the default standing. But it also had the power, in a proper case, to set aside the default and permit the defendant to plead. Whether this discretion was exercised soundly in this case, is not a question necessary for us to pass on. After the demurrer was filed and called for hearing, the plaintiff voluntarily withdrew from the case, and announced that he would not further prosecute it, but rely on the judgment that had been set aside. The court very properly, at this stage of the proceedings, entered a judgment of a dismissal for want of prosecution.

Let the judgment be affirmed. The other Judges concur, except Judge Napton, who was of counsel and did not sit.

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THE CITY OF ST. LOUIS, Respondent, *vs.* WILLIAM FITZ, Appellant.

1. *Offenses—Association with thieves, aiding and abetting—Individual morality—Public protection.*—An individual may associate with thieves, &c., without being guilty of any offense, for it is not the business of the legislature to keep guard over individual morality; but if such person so associates with a design to aid, abet or promote, or in any way assist, the parties charged with, or suspected of, being thieves, prohibitory legislation may be applied, not to correct the evil consequences which such association may bring on the individual, but to protect society from actual or anticipated breaches of law.

PER SHERWOOD, JUDGE, CONCURRING.

1. *Ordinances—St. Louis, City of—Associating with thieves—Validity of.*—The ordinance of the city of St. Louis, (City Ord., Chap. 20, Art. 4, § 1,) prohibiting the "knowingly associating with persons having the reputation of being thieves and prostitutes," is void as invading the right of personal liberty.

*Appeal from St. Louis Criminal Court.*

*David Murphy*, for Appellant.

I. The association of defendant should have been presented to the jury, by the evidence and the instruction, to have been for the purpose of rendering assistance to the dangerous class proscribed by the ordinance. That is evidently the purport of the ordinance, or it is without authority of law. (Rex vs. Woodfall, 5 Burr., 2667; 14 Mo., 561; O'Connell vs. Reg., 11 Cl. and F., 155; Rex vs. Kenrick, 5 Q. B., 61; Brown's Com., (2d Ed.) 870.)

II. The offense should be stated with particularity, that the defendant may be able to meet the charge. (State vs. Tuley, 20 Mo., 422; J'Anson vs. Stuart, 1 Term., 748.)

III. The names of the persons, who are alleged to be persons having the reputation of being thieves and prostitutes, should be set out. (Gale vs. Reed, 8 East., 80; 1 Rol. Abr.)

*T. J. Cornelius*, for Respondent.

I. "Courts will give ordinances a reasonable construction, and will incline to sustain rather than overthrow them." (Dill. Mun. Corp., § 353, and cases cited.)

NAPTON, Judge, delivered the opinion of the court.

The defendant was charged in the Police Court of the city of St. Louis, with violating the ninth clause of the first section of article 4, chapter 20, of the city ordinances, "by knowingly associating with persons having the reputation of being thieves and prostitutes, previous to August 21, 1871."

The trial resulted in his conviction by the Police court, and the imposition of a fine of five hundred dollars. An appeal was taken to the Criminal Court, and the defendant was again tried and convicted, and the same fine inflicted.

On the trial, the court instructed the jury, "that if they believed from the evidence, that the defendant, William Fitz. has, within a year prior to the 21st day of August, 1872, knowingly associated with persons having the reputation of being thieves and prostitutes, then they will find him guilty under ordinance, and assess the fine in a sum not less than five hundred dollars."

The defendant asked an instruction, "that the word asso-

ciate implies an identification or community of interest, and that it is incumbent on the city to prove, that defendant has, in the city of St. Louis, within a year from the filing of the complaint herein, associated, knowingly and unlawfully, with thieves and prostitutes, with an intent to assist or encourage such persons in the perpetration of some act prohibited by law or the ordinances of the city of St. Louis, or they must acquit."

The instruction was refused.

By the common law a conspiracy was an indictable offense. That was an association of two or more persons to break the law, whether this association resulted in any act to be done by the conspirators, or not. The gist of the offense was conspiring for an unlawful purpose, or to effect a lawful purpose by unlawful means. This furnished a formidable weapon to the law officers of the crown, and was therefore strictly construed by the English judges. In indictments and other forms of criminal proceedinge to enforce this law, all the specific allegations were required to be made, which contributed to point out the offense.

The ordinance, for the breach of which the defendant is prosecuted, goes beyond the common law crime of conspiracy, and declares association with certain persons, suspected with being thieves or prostitutes, an offense.

The theory, upon which the case was tried in the Criminal Court, seems to have been, that a mere association with the class of persons described subjected the defendant to a criminal prosecution, without regard to the commission of any offense against the law, or any intent to commit such offense.

We find, on a careful examination of the evidence, that the reputation of being thieves or prostitutes is ascertained by calling the police officers, who are the prosecuting parties. For, in this case, all the witnesses outside of the police force, including some fifteen or twenty of the neighbors and associates of the defendant, contradict the statements of the police officers concerning the reputation of the persons alleged to be thieves and in whose society the defendant was found. So

that, adopting this theory, the ordinance in question simply authorizes any police officer in the city to arrest any man who may be found at a drinking saloon, licensed by the city, or at a brothel, also licensed, in company with persons suspected by the police as thieves or prostitutes, and a fine of $500 is imposed for being found at places which the city authorities see fit to license, without any complicity being shown with the people there found to commit any unlawful act whatever.

We do not wish to be understood as intimating, that the verdict of the jury was wrong on the evidence. It may be that they discredited the witnesses for the defense, as they had a right to do. The Criminal Court, who heard the evidence, having refused to set aside the verdict, this court cannot interfere.

But we doubt the validity of this ordinance, as interpreted by the Criminal Court. We doubt the power of the State Legislature to pass such a law, giving it the construction which was given in this case. There is no doubt of the power of the Legislature, or of municipalities deriving their power from the Legislature, to make police regulations designed to promote the health and morals of the community. Laws to prohibit or regulate gaming, sales of intoxicating liquors, houses of prostitution, and thus indirectly advance the morals and good order of society, are beyond question. But, as a general rule, Legislatures do not attempt to regulate the morals or habits of individual citizens. When a positive breach of law is reached, or when the act of the citizen is such as to justify an implication of an intended breach of law, then the criminal law may interfere, but not till then. So long as the power and right of locomotion is conceded, and a citizen has the right of selecting his associates, it is difficult to see how the Legislature can interfere, upon the mere ground of correcting the morals of the person concerned. An association with thieves, or with persons suspected to be thieves, or having the reputation of being thieves, may be very injurious to the person seeking such society, but it is

not the business of the Legislature to keep guard over individual morality. But if such person so associates with a design or intent to aid, abet, promote, or in any way assist the parties charged or suspected of being thieves, prohibitory legislation may well be applied, not to correct the evil consequences which such association may bring on the individual, but to protect society from actual or anticipated breaches of law.

Although the evidence in this case did not show, that any of the persons named as reputed thieves had ever been charged or convicted of such a felony, yet we may suppose a case where a person had been so convicted and sent to the penitentiary. Such person might well be said to have the reputation of being a thief, as he had actually been convicted and punished as such by a competent judicial tribunal; but even in such case, is he therefore marked as a leper in society, to be avoided by his former associates? This would close the door to repentance or reformation, and once a thief always a thief would be the maxim upon which police officers would act. Perhaps the maxim may answer very well, practically for them, especially in justifying precautionary measures, but it will not, and ought not to be enforced by courts, whose business it is to administer justice. However humble may be the citizen arrested under an ordinance prohibiting intercourse with such former criminal, his right to select his own company, so long as no actual breach of law occurs, and no intended breach of law can be established, is as sacred, and as much under the protection of the State, as though he moved in the more elevated spheres of society. The tendency of power to pass from the many to the few is sufficiently rapid without further encouragement, and the power to arrest for keeping bad company is a dangerous one, liable to great abuses and partial and unjust discriminations. The principal ground, on which the police witnesses in this case based their testimony of the reputation of certain persons, whom they declared to be thieves and prostitutes, was, that they lived in the neighborhood of the defendant, on Almond street, and this neighborhood was infested with thieves and prostitutes;

so that any other man or woman might as well have been arrested and fined, as the defendant. It may have been his misfortune to live in such a locality. It seems, that he was born and lived there all his life with his mother and sisters, whom he supported by his labor, and who were conceded to be reputable persons. The defendant's circumstances may not have enabled him to change his abode, and so his associations were necessarily bad. Yet he proved by all the witnesses called, nearly twenty, that he was industrious, frugal-honest, and constantly in the day employed as a laborer by the East St. Louis Elevator Company, and had never been charged or suspected of any offense against any law or ordinance of the State or city, until this arrest under the ordinance in question.

I do not mention this as any reason for reversing this judgment. The jury were the judges of the facts in evidence; it is only stated to illustrate the danger of leaving to ministerial officers the construction of an ordinance so vaguely framed and capable of such latitudinous construction.

The judgment will be reversed, because the court refused to give such explanations of the law to the jury as would have required some proof of complicity, actual or intended, with the persons named as having the reputation of being thieves.

Moreover, considering this as a criminal proceeding, as it was treated throughout in the Criminal Court, the charge was too indefinite and vague to be tolerated in such proceedings. There is no place named, not even this city, where the offense was committed. No names are given of the persons said to be laboring under the reputation of being thieves. How, under such a charge, was the defendant to prepare his defense?

It is not to be understood, that this court declares the ordinance in question invalid, but when it is to be enforced by judicial tribunals, the explanations asked by the defense in this case should go to the jury. It is clear that a mere casual association, or an association for honest purposes, was not within the intent of the ordinance, yet, under the instruction

given, the jury might have believed this highly penal prohibition to have been absolute and unqualified.

Judgment reversed. The other Judges concur, except Judge Wagner, who is absent.

Separate opinion of Judge SHERWOOD.

I concur in the above reasoning and in the result reached. But I will not be understood as concurring in such portion of the foregoing opinion which seemingly intimates the validity of the ordinance in question. I hold the ordinance absolutely invalid, on the broad ground, that its direct effect is to invade and necessarily destroy one at least of those "certain inalienable rights" of the citizen bestowed by the Creator and guaranteed by the organic law, personal liberty.

In sparsely populated regions the encroachments on this right are infrequent, but it is in districts having dense population where encroachments on the liberty of the citizen are of more frequent occurrence, and more frequently successful. And such attempted encroachments are usually justified on the specious plea of necessity. Besides, the power to restrain certain associations must necessarily imply and embrace the power to compel such associations, whenever those having the authority to prohibit shall thus determine.

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ANTON HEMBROCK, Appellant, *vs.* HENRY STARK, Respondent.

1. *Landlord and tenant—Attachment—Counter-claim for damages growing out of.*—In an action by attachment under the Landlord and Tenant Act for rent defendant set up in defense an agreement of plaintiff to release him from all rent in arrears, if he would surrender possession before the expiration of his term; and to take care of what property he might leave on the place. *Held*, that defendant, having vacated the premises as agreed, might set up the contract in bar of plaintiff's claim for rent; but could not set up a counter-claim for damages caused by levy of the attachment upon his property remaining on the premises.

His remedy for damages growing out of the attachment was by suit on the attachment bond.

*Appeal from St. Charles Circuit Court.*

*B. B. Kingsbury*, for Appellant.

I. The court erred in not sustaining the motion of appellant to strike out the defense of the counter-claim. (2 W. S., 1016, § 13; Holzbauer vs. Heine, 37 Mo., 443; Kinney vs. Miller, 25 Mo., 576.)

*W. A. Alexander*, for Respondent.

I. Plaintiff violated his contract to release, and Stark had a right to set up the release contract in his answer, by way of counter-claim, and recover in this suit whatever damages he suffered by reason of Hembrock's violation of his said release agreement. (Reed vs. Chubd, 9 Iowa, 178; 10 Iowa, 23; Reed vs. Samuel 22 Tex., 114.)

Adams, Judge, delivered the opinion of the court.

The plaintiff brought an action by attachment under the Landlord and Tenant Act, for rent.

The defendant by answer denied all the material allegations of the petition, and as a further defense and counter-claim set up, that the plaintiff had released him from the payment of the alleged rent under and by virtue of an agreement with him, that if the defendant would surrender the possession of the farm before his time expired, the plaintiff would discharge him from payment of any rent in arrear or unpaid. And the answer further alleges, that it was a part of the agreement, that the plaintiff was to take care of what property might be left on the place belonging to defendant; and the answer further charges, that the plaintiff violated his agreement, by suing out this attachment and causing it to be levied on defendant's property left on the farm, and causing the same to be sold under the proceedings in the attachment suit; that the property sold was worth five hundred dollars, and that the plaintiff thereby converted the same to his own use; and the defendant claimed judgment for the amount of said property by way of counter-claim The plaintiff filed a motion to strike out the alleged release and

counter-claim, but the court overruled this motion, and the plaintiff excepted. He then replied to the new matter and counter-claim set up in the answer. The case was submitted to a jury and upon the trial each party gave evidence tending to prove the issues on his part. The court at the instance of the defendant gave an instruction to the effect, that if the jury found for him, they must assess his damages at the amount of the proceeds of the sale of his property under the attachment. The plaintiff objected to this instruction, and excepted to the ruling of the court in giving the same. The jury found for defendant, and assessed damages in his favor at the amount of the sale of his property under the proceedings in attachment. The plaintiff filed a motion for a new trial which was overruled, and he excepted, and has brought the case here by appeal. The only material point presented by this record is the action of the court in refusing to strike out any part of the defendant's answer, and in declaring to the jury, that they might allow the defendant damages by way of counter-claim for the amount of the sale of his property in the pending attachment.

The defendant had no right under the alleged agreement with the plaintiff to be allowed these damages by way of counter-claim. If he was damaged by the attachment, he cannot set up such damages as a counter-claim. His remedy for damages growing out of the attachment is by suit on the attachment bond. The plaintiff's attachment, when levied, placed the property of the defendant in the custody of the law. The money, arising from the sale of the attached property during the pendency of the attachment, took the place of the property to abide the final result of the attachment suit. The money was the defendant's, subject however to the proceedings in the attachment. If the suit resulted in his favor as it did, this money must be paid over to him. But was he entitled to recover the amount of the sales of the property as a counter-claim, and also to receive the same money from the officer who held it to abide the final result? The agreement to discharge the defendant from payment of

rent constituted a bar to the plaintiff's right of recovery; but that part of the answer setting up the damages growing out of the attachment as a counter-claim should have been stricken out.

For the same reason the instruction directing the jury to allow these damages in favor of the defendant was erroneous.

It was no breach of the plaintiff's obligation to take care of the defendant's property to levy this attachment. The levy only placed it in the custody of the law. If the property was sacrificed by the attachment sale, the damage to the defendant resulted from the attachment, and not from a breach of plaintiff's obligation to keep the property.

The judgment must be reversed and the cause remanded; the other Judges concur.

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RICHARD GILCHRIST, Appellant, *vs.* E. F. & F. L. DONNELL, Respondents.

1. *Notary public—Notice to indorser—Due diligence, what amounts to.*—A notary public, not knowing the residence of an indorser, on the day of protest made inquiry at the bank in St. Louis, where the note was payable, and at the place of business of another indorser, and examined the City Directory, to ascertain the residence, but without success. He thereupon placed the notice in the city post office. The evidence showed, that other indorsers could have given the desired information, and that one of them lived in East St. Louis, immediately across the river. *Held*, that it was the duty of the notary, to inquire at least of all the parties to the note, if accessible; and that he might have prosecuted his inquiries for that purpose for several days; that there was no search made, such as the law requires, and that putting the notice in the post office, under the circumstances, amounted to nothing.
2. *Notice to indorser—Residence—Presumption as to service of notice must be made, how.*—There is no presumption, that an indorser resides in the town or city where the bill or note is made payable. If such be the fact, notice cannot be served by depositing it in the post office; but the service must be personal, or by leaving it at the usual place of business of the indorser, or with his family at his domicile.
3. *Practice, civil—Instructions, etc.*—Instructions, not predicated upon the issues tried should not be given.

*Appeal from Jefferson Circuit Court.*

*Henry F. Ahlvers*, for Appellant.

I. When a note is made payable at a particular place, presentment at that place for payment is sufficient. (Glasgow vs. Pratte, 8 Mo., 336; Lawrence vs. Dobyns, 30 Mo., 196.)

II. The notary used due diligence. (Sto. Prom. Notes, (4th Ed.,) 437, § 344.)

The notary swears in his deposition, that he first inquired at the Central Savings Bank, the holder of the note, of the cashier thereof, as to the places of residence or business of respondents, and could not ascertain them; that thereupon, he inquired at the place of business of a firm, which indorsed said note to said bank, of the person in charge of said business, and could not ascertain from him such places of residence or business of respondents; that thereupon, he examined the City Directory of St. Louis, for the year when protest was made, and was unable to find the places of residence or business of the respondents. Did the law require more than this, of the notary under the circumstances? Was the notary under legal obligation to go into Illinois for the purpose of inquiring of an indorser, to learn where respondents had their places of residence or business? It has been frequently decided, that where an indorser lives outside of the limits of the city, where protest is made, service of notice may be made upon him through the mail. (Bank of the State vs. Vaughan, 36 Mo., 90; Barret vs. Evans, 28 Mo., 331.)

III. The holder of the note is not required to see that notice actually reaches the indorser. (Sanderson vs. Reinstadler, 31 Mo., 483.)

IV. The plaintiff makes out a *prima facie* case by proving notice by letter, addressed to the defendant at the town generally. (2 Greenl. Ev., (9th Ed.,) 203, § 188, n. 3.)

*J. J. Williams*, for Respondents.

I. There are but two methods of serving notice of dishonor on an indorser, to-wit: by personal delivery, when he resides or does business in the same town or city where the pro-

test is made; or by special messenger or letter, addressed to him at his nearest post-office, or that at which he usually receives his letters, if he resides elsewhere. But to put the notice in the city post-office of a large city, to be distributed directly from that office, without going into the mail, when the indorser lives in a different and distant county, as was the case here, is entirely without precedent or authority. (Chitty Bills, 288; Edw. Bills and Notes, 601, 602, 603.)

II. If actual notice is not given in the manner required by law, it must appear that due exertions were made to ascertain the necessary facts to enable the notary to give it. (Edw. Bills and Notes, 609, 610, 611; Dickens vs. Beal, 10 Pet., 572.) The evidence utterly fails to show any such exertions

ADAMS, Judge, delivered the opinion of the court.

This was an action on a negotiable promissory note by the plaintiff as indorsee, against the defendants as prior indorsers. The note was payable at the Central Savings Bank of St. Louis, Missouri, and was duly protested at maturity. The defense relied on, and the only issue tried was, that the defendants were not duly served with notice of demand and protest. The evidence conduced to show, that they resided in Jefferson County. The notary, who protested the note, testified, that he did not know where the defendants resided: that on the day of the protest, he inquired of the bank officers and also at the place of business of a firm, who had indorsed the note, and could learn nothing about their residence.

He also examined the City Directory of St. Louis, and did not find the names of the defendants, and thereupon he put the notices in the city post office of the City of St. Louis, directed to the defendants. The plaintiff asked an instruction based upon those facts, to the effect, that if the jury found them to be true, they amounted to reasonable diligence, and entitled him to recover. This instruction was refused, and its refusal raises the only material point discussed here.

Whatever the law may be in regard to the residence of the

drawer of a bill, or maker of a note, there is no presumption that an indorser resides in the town or city where the bill or note is made payable. If such were the case, the notice could not be served by depositing it in the post office of the city. If parties reside in the town or city, where demand and protest are made, the rule, as laid down by this court, is, that the service must be personal, or by leaving it at their usual place of business, or with the family at their domicile. (Barret vs. Evans, 28 Mo., 331.)

The facts relied on do not show reasonable diligence in ascertaining the residence of the defendants. The evidence in the case shows, that the other indorsers could have given the required information, one of whom lived in East St. Louis, immediately across the river. It was the duty of the notary to inquire at least of all the parties to the note, if accessible to him, as to the residence of defendants. He might have prosecuted his inquiries for several days, and the presumption is, if he had done so, he would have been successful. It is only when due search and examination are made for the residence of parties, that a notice of demand and protest is dispensed with. There was no such search made in this case, and putting the notice into the post office, under the circumstances, amounted to nothing. (Story Notes, §§ 316, 335.)

The plaintiff also asked two other instructions, which were mere abstract propositions of law, and did not touch the question of notice, the only issue tried. For this reason they were properly refused.

The case seems to have been fairly presented by the instructions given on both sides, and, upon the record as it stands here, the judgment is for the right party.

Judgment affirmed. The other Judges concur.

W. W. Paul, Respondent, *vs.* M. S. Leavitt, Appellant.

1. *Witnesses—Competency of husband when joined with wife.*—Where husband and wife are joined as parties, the testimony of the husband is inadmissible. Sections 1 and 5 of the Witness Act (W. S., 1372-3) do not render him competent.
2. *Married woman—Estate of—Deed vesting title in her—Separate estate created how—Parol evidence as to deed.*—A deed to a married woman merely vesting in her a title in fee, but containing no provisions excluding the marital rights of the husband, will not create in her a separate estate which can be charged for her debts. And in suit for that purpose, testimony, showing, that the money of the wife paid for the lands; that the deeds were taken in her name in consequence; that her husband always acted as her agent in buying and selling lands, etc., would be incompetent, as having the effect of varying the terms of the deed by parol testimony.

*Appeal from Audrain Circuit Court.*

*Forrist & Ladd*, for Appellant.

I. Frank A. Leavitt was disqualified and incompetent as a witness as against Mary S. Leavitt, his wife and co-defendant. (1 Greenl. Ev., § 334; 1 Phillip's Ev., 77; W. S., 1372; Fugate vs. Pierce, 49 Mo., 441.)

II. The parol evidence, as given by the witness Leavitt, was incompetent either to effect the deeds to Mrs. Leavitt offered in evidence, (Kimm vs. Weippert, 46 Mo., 532; 1 Greenl. Ev., §§ 275–277; 1 Phillip's Ev., 547–8,) or, to alienate or destroy the marital rights of her husband in the lands of Mrs. Leavitt described in the petition. (Schafroth vs. Ambs, 46 Mo., 580.)

III. The estate of Mrs. Leavitt in the lands described in the petition was purely legal, and one to which the marital rights of her husband had become attached and vested, and hence, said lands could not be subjected to the payment of her debts as her separate property. (Schafroth vs. Ambs, 46 Mo., 114; Bauer vs. Bauer, 40 Mo., 61; 2 Story's Eq., 1381.)

*S. M. Edwards, with A. Binswanger*, for Respondent.

I. The Circuit Court committed no error in admitting the testimony of F. A. Leavitt, the husband. The common law has been repealed by statute. All persons may now testify except those specially named in § 8. (W. S., 1374.)

II. This witness was the agent of his wife in this and all

other business transactions. Under similar circumstances she would be permitted to testify for or against him. (W. S., 1373, § 5; Hardy vs. Mathews, 42 Mo., 406.) The causes at common law for the exclusion of husband and wife are identical.

III. No particular words are necessary to create a separate estate. It is the intention rather than the language. (Story's Eq., § 1380; Boal vs. Morgner, 46 Mo., 48.)

IV. If the husband, as agent, had bought the land with the separate funds of the wife, and taken the title directly himself, it would be held and treated as her separate property. Much more if he took unintentionally so as to vest in him a marital interest. (Tennison vs. Tennison, 46 Mo., 77; Shafroth vs. Ambs, *Id.*, 114.) Even if the husband here had a marital interest, which is denied, equity to prevent fraud will subject her interest to the payment of her debt. (Pemberton vs. Johnson, 46 Mo., 342.)

WAGNER, Judge, delivered the opinion of the court.

The petition alleges that defendants, Frank and Mary S. Leavitt, are husband and wife, and that the said Mary made and executed her promissory note to the plaintiff, and that for the payment of the same she charged her separate property. There was a prayer for judgment against her alone, and that her separate estate might be subjected to the payment of the note. The defendant, Mary S., filed her separate answer to the petition, in which she denied the averments, that she had or possessed any separate property.

Upon this single issue, as to whether defendant had any separate estate, the trial was had.

For the purpose of maintaining the allegations of the petition, the plaintiff introduced several deeds of general warranty conveying certain real property to the defendant, Mary S., by a fee simple title. He then called as a witness, and had sworn, the co-defendant, Frank, who testified that the money of his wife paid for the lands, and that the deeds were taken in her name in consequence thereof; that he had acted as her

agent in buying and selling lands, and that when he sold her lands he used the same money in buying others, and that the title was always taken in her name. The defendant objected to this witness, on the ground that he was disqualified; and also objected to the evidence, because it was not permissible by oral testimony to alter the character and effect of the deeds. But the court overruled both of these objections, and exceptions were duly taken and saved to its rulings.

This was all the evidence in the case, and the court found for the plaintiff, and awarded a special execution against the lands of the female defendant.

We will first notice the question raised in regard to the admissibility of the evidence of the husband, who was made a co-defendant.

No rule was better settled at common law than that husband and wife could not be permitted to give evidence either for or against each other. Whatever modification there is in that rule is made by the statutes. Where the statute has made no innovation on the rules of evidence as they previously existed, they remain the same as they were. The exceptional cases, in relation to the removal of the disability of the wife to testify where her husband is a party, are contained in the fifth section of the Witness Act. That section provides, that, the wife shall not be disqualified in certain specified instances where the husband is a party to the suit, but there is nothing said in reference to the husband being permitted to testify either for or against the wife.

By the first section, where the husband and wife are adverse parties to the action, they may give evidence in the case in their own behalf in the same manner as other parties (Moore vs. Moore, 51 Mo., 118.)

But these sections afford no warrant for the course pursued in this case, and I do not think that the statute, by the most liberal interpretation, can be construed to permit it. Aside from the disqualification of the witness, his evidence was clearly illegal. The deeds were definite and unambiguous,

and had a settled legal construction, and it was not competent to vary their effect or alter their meaning by parol testimony.

The court evidently erred in finding that the defendant, Mary S——, was possessed of a separate estate. The property was conveyed to her by deeds of general warranty, in the usual and ordinary form. They vested in her a title in fee, and that was all. The husband clearly had a marital interest in the property, and therefore there could be no separate estate. It is true, the current of authorities now is, that no special or technical words are required to create a separate estate in a married woman. Any provision that negatives or excludes the marital rights of the husband, while giving the property to the use of the wife, will be held to create such estate. But the instrument conveying the property must indicate such an intent. In the present case there is an absolute absence of anything tending to show that a separate estate was intended. As the deeds simply conveyed the property in fee, no separate estate was thereby created.

It follows that the judgment must be reversed and the cause remanded. The other Judges concur, except Sherwood, J., who is absent.

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GRISWOLD E. WARNER, Plaintiff in Error, *vs.* JOSHUA SHARP, Defendant in Error.

1. *Sheriff's deed under mortgage—Recital as to order of sale, etc.*—A sheriff's deed under foreclosure of mortgaged land, is not invalid for failing to state that the County Court granted the order of sale in a case where no other court had jurisdiction. And a recital in the deed, that the order was issued "at the June adjourned term," is sufficiently definite without naming the day of the term, where this fact might be ascertained from the records of the court.

*Error to Montgomery Circuit Court.*

*Powell & Hughes*, for Plaintiff in Error.

I. The deed from the sheriff was improperly admitted. It does not appear from the deed, what court, if any, or

authority, ordered the sale of the real estate in said deed described. (Tanner vs. Stine, 18 Mo., 580; Lackey vs. Lubke, 36 Mo., 115; McCormick vs. Fitzmorris, 39 Mo., 24; Buchanan vs. Tracy, 45 Mo., 437.)

2. The date of the order is totally omitted. (Stewart vs. Severance, 43 Mo., 322; Buchanan vs. Tracy, 45 Mo., 437.)

*A. A. Buckner*, for Defendant in Error.

I. The deed upon its face shows, that this order was made by the County Court at its June Term, 1862, adjourned over. No other court then, except the Circuit Court, could have jurisdiction to make a sale. There was no Circuit Court in June, but there was a regular term of the County Court in June, of which the Circuit Court and this court will take judicial notice.

ADAMS, Judge, delivered the opinion of the court.

This was ejectment for land in Montgomery county, being the west half of lots one and two of the north-east quarter, and the north-west quarter of section three, in township fifty of range six.

Both parties claimed title under Josiah Whiteside.

The defendant claims by virtue of a sheriff's deed made under a foreclosure sale of a mortgage, which had been given by Whiteside to secure the loan of school monies. The mortgage was given prior to the emanation of plaintiff's title, and was duly acknowledged and recorded.

The case was submitted to the court sitting as a jury, and resulted in a finding and judgment for the defendant.

On the trial, the defendant gave evidence conducing to show, that in 1864 all the records of Montgomery county had been destroyed by fire, and also gave evidence conducing to show, that the County Court of Montgomery county, on account of non-payment of the interest due on the debt from Whiteside, had ordered the land under the mortgage to be sold by the sheriff.

The defendant then offered the sheriff's deed, which was made in pursuance of the foreclosure sale. The plaintiff ob-

jected, because the recitals of the deed did not show by what court the order of sale was made. The deed recites, that at the June adjourned term, it was ordered, that the sheriff sell to the highest bidder at the court-house door, in the town of Danville, for cash in hand, on the 4th Monday of October next, during the sitting of the Circuit Court, all the right, title, and interest of Josiah Whiteside, in, and to the lands (describing them) and reciting the mortgage debt, &c.

Although the court is not named in the recital by which this order of sale was made, it sufficiently appears, that it was the County Court, as there was no other court which had jurisdiction to make this sort of summary order, to foreclose a mortgage to secure school funds. This objection was not tenable, and the court properly overruled it.

The plaintiff also objected to the sheriff's deed, because it did not recite the day of the month on which the order for sale was made.

The deed recites, that the order was made at the June adjourned term, 1862.

If it was necessary to ascertain the exact day of the month, that might be done by reference to the record, "*id certu mest quod certum reddi potest.*"

I think the sheriff's deed was properly admitted as evidence. Judgment affirmed. The other Judges concur.

THE OCTOBER TERM AT ST. LOUIS IS CONTINUED IN VOL. LIV

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ADMINISTRATION.

1. *Administrator—Note given by, under mistake as to amount of assets.*—Certain unauthorized executions had been issued from the Probate Court on behalf of the creditors of an estate, against the individual property of an administrator, for sums claimed to be due them by him as administrator. Under the pressure of threatened levy, and under a mutual misapprehension as to the extent and value of the assets in his hands, the administrator gave his individual notes for specified sums, payable partly in cash, and partly on time. No abatement in the amount of the claims was made, and no compromise effected further than the granting of an extension of time. In consideration of the notes, the creditors surrendered and receipted for their claims. It afterwards transpired that the amount of assets in his hands had been miscalculated and over-estimated in the Probate Court, and the amount charged against him was reduced accordingly by order of court. Suit having been brought against him upon the notes. *Held*, that the administrator might properly show in defense, that the notes were given under a mistaken impression of the extent of means in his hands; and, that in point of fact, there were no trust assets to which plaintiff had a right to look for payment. And *semble*, that defendant might have no claim to the interposition of equity, because of his own negligence, except for the fact that the levies on his own property placed him under duress.—Smith v. Paris, 274.

   [The above case is not one hinging on a compromise of contested claims between parties, where the law or the facts are uncertain.]

2. *Administrator's deed—Clerical errors may be corrected.*—An administrator's deed, which contains all the recitals as to notice, appraisement, sale, etc., required by the statute, (W. S., 98, §§ 35, 37) but sets out certain dates which are irreconcilable, may be explained and corrected by the introduction of the appraisement, report of sale and other like original papers. Such errors are merely clerical, and may be corrected by extrinsic evidence.—Moore v. Wingate, 398.

3. *Administration—Appraisers, oaths of.*—An appraisement of property for the purpose of administrator's sale, sworn to by two out of three appraisers, is a sufficient compliance with the law. (W. S., 887, § 6.)—*Id.*

4. *Administrator—Appraisement—Jurat, etc.*—An administrator's sale is not rendered void by reason of the fact that the person taking the affidavit of the appraisers subscribes himself as administrator.—*Id.*

5. *Administrators, suits by—Personal judgments—Contracts by administrators and their sureties—Sess. Acts 1865–6, p. 85—Probate Court, jurisdiction of.*—A. as administrator of B. sued C., the administrator of D., and the sureties on his official bond, for breach of a contract entered into by the defendants. The case was dismissed and judgment rendered against A. personally for costs. *Held*, that this case was not embraced under Sess. Acts 1865–6, p. 85, giving Probate Courts exclusive jurisdiction to hear and determine all suits and other proceedings instituted "against executors and administrators, upon any demand against the estate of their testator or intestate," and that a personal judgment against A. was not proper, inasmuch as he sued in his representative capacity.—State to use v. Maulsby, 500

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ATTACHMENT.

1. *Jeofails, Statute of—Practice, civil—Pleadings—Allegations—Attachment bond.*—A petition on an attachment bond, which does not allege that the State sues, but sets forth by sufficient averments the title of B., for whose benefit the bond was made, and who is the real party in interest, and all the acts entitling him to recover, must be held good after verdict.—State v. Webster 135.

2. *Justices' Courts—Pleadings—Attachment—Plea in abatement—Inaccuracy.*—In a suit by attachment before a justice, the plea in abatement put the truth of the grounds for attachment, as alleged by plaintiff, in issue on the day of the making of the plea instead of on the day the affidavit for an attachment was made. *Held*, this was an inaccuracy committed by the justice, and might have been corrected by motion at the proper time, and is no ground for interference by this court.—Hamblin v. Dunn, 137.

3. *Attachment, suits by—Courts—When jurisdiction acquired.*—In attachment causes, the jurisdiction over any given subject matter is obtained by a levy thereon of a writ properly issued. [Hardin v. Lee, 51 Mo., 241, affirmed.]—Freeman v. Thompson, 183.

4. *Attachment—Delivery bond—Possession of property.*—The obligation entered into in a forthcoming bond given by defendant in an attachment suit to deliver the property attached according to the orders of the court, is sufficient presumptive evidence, without further proof, that the property was "found in his possession," as contemplated by the statute. (W. S., 188, § 24.) Such a bond will warrant summary proceedings by motion against the obligee and his sureties.—Hoshaw v. Gullett, 208.

5. *Attachment—Plea in abatement—Trial on the merits.*—In suit began by attachment, verdict for defendant on the plea in abatement, does not deprive the court of its jurisdiction to proceed with the case upon the merits (W. S., 189, § 42,) where defendant is a resident of the county, and in the absence of evidence to the contrary, such fact will be presumed in favor of the judgment.—Brackett v. Brackett, 265.

6. *Attachment—Bond—Non-suit—New bond, etc.*—An attachment bond executed by A. principal, *per* B. surety, duly approved by the Clerk of the Court, is not an absolute nullity, such as will warrant a dismissal of the suit where plaintiff offers to substitute a good and perfect bond in its place.—McDonald & Co., v. Fist & Co., 343.

7. *Attachment—Release of property—Judgment in attachment—Limitations, etc.*—The cause of action against a sheriff, for losses sustained by his unauthorized release of attached property pending the trial of the attachment proceedings, does not accrue from the date of the release but from that of the judgment in the attachment suit. The three years limitation commences running in his favor from that time.—Lesem, v. Neal, 412.

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BAILMENT.

1. *Bailment—Deposit with inn-keeper—What care required.*—An inn-keeper who gratuitously receives a deposit of valuables, is only responsible in case of their loss for gross negligence; *i. e.* for that omission of care which even the most inattentive and thoughtless never fail to take of their own concerns.—Wiser v. Chesley, 547.

BAILMENT, continued.

2. *Bailment—Deposit—Liability—Onus.*—A depositor makes out a *prima facie* case when he shows a deposit made, and a demand for and refusal of the thing deposited. The *onus* is then upon the depositary to exonerate himself from the liability which attached when he assumed the custody of the article.—*Id.*,

## B.

BIGAMY; See Practice, Criminal, 5.

BILLS AND NOTES.

1. *Bills and Notes—Orders—Acceptance, conditional—Contract pending.*—The acceptance of an order for money, stated therein to be against sums due on a pending contract, is a conditional acceptance, and a subsequent breach of the contract by the drawer may be a good defense to a suit on such acceptance.—Crowell v. Plant, 145.

2. *Bills and Notes—Bonds—Parol testimony—Principals—Sureties.*—Parol testimony is admissible to prove who are principals and who are sureties to notes or bonds in actions at law.—Mechanics' Bank v. Wright, 153.

3. *Presumptions—Payments—Separate credits—Joint debts.*—A. was indebted to B. on a note made by himself and others, and after the maturity of said note, he rendered services for B., who at settlement, paid A. some money. *Held*, that in a suit on said note by B., there was no presumption that A. had paid it.—*Id.*

4. *Equity—Note, judgment procured on by fraud—Sale and purchase under, effect of.*—Where the maker of a note, given for the purchase money of land, suffered the holder to procure judgment thereon, upon the strength of assurances from the latter, that he intended to procure judgment merely to secure the debt, and that the judgment should be held in abeyance, and the holder afterward, without the knowledge or consent of the maker, caused the land to be sold under the judgment, and bought it in; *held*, that the maker of the note might resort to equity to have the sale set aside on payment of the note, and other proper relief administered. A title so obtained could stand only as security for the reimbursement of the debt.—Wright v. Barr, 340.

5. *Notes, suit upon—Loss pending action—Subsequent proceedings.*—Where in suit before a justice upon a note, the instrument was filed, but lost before the trial, plaintiff is not compelled after the loss to proceed as indicated by the statute where suit is brought upon a lost note. (W. S., 813, 814, §§ 9, 10.)—German Savings Bank v. Kerlin and Marks, 382.

6. *Bills of exchange and promissory notes—Time of payment fixed—Days of grace—Statute, construction of.*—Bills of exchange and promissory notes, payable at a day certain, are entitled to three days of grace. (W. S., 216, § 17; 217, § 18.)—Turk v. Stahl, 437.

7. *Bills and notes—Surety—Agreement as to co-surety—Liability of surety, etc.*—Where one becomes surety on a non-negotiable promissory note on the express condition that another shall be procured as co-surety, and the latter fails to join, the surety will not be liable, although the note is in the hands of a holder having no notice of the agreement. As to the surety, while the condition remains unperformed, the instrument is merely an escrow and there is no delivery.—Ayres v. Milroy, 516.

8. *Bills and notes—Surety—Agreement to obtain co-surety—Notice—Maker, agent of surety.*—Although a surety upon a note is induced to sign upon the promise of the maker that a co-surety shall be joined, yet if nothing on the face of the paper imparts notice to the holder or puts him on inquiry as to such agreement, no fault attaches to the latter, and the surety must run the risk of the fraud of his own agent. PER NAPTON, J., SHERWOOD, J., CONCURRING.—*Id.*

BILLS AND NOTES, continued.

9. *Notary public—Notice to indorser—Due diligence, what amounts to.*—A notary public not knowing the residence of an indorser, on the day of protest made inquiry at the bank in St. Louis, where the note was payable, and at the place of business of another indorser, and examined the City Directory to ascertain the residence, but without success. He thereupon placed the notice in the city post office. The evidence showed, that other indorsers could have given the desired information, and that one of them lived in East St. Louis, immediately across the river. *Held*, that it was the duty of the notary, to inquire at least of all the parties to the note, if accessible; and that he might have prosecuted his inquiries for that purpose for several days; that there was no search made, such as the law requires, and that putting the notice in the post office, under the circumstances, amounted to nothing.—Gilchrist v. Donnell, 591.

10. *Notice to indorser—Residence—Presumption as to service of notice must be made, how.*—There is no presumption, that an indorser resides in the town or city where the bill or note is made payable. If such be the fact, notice cannot be served by depositing it in the post office; but the service must be personal, or by leaving it at the usual place of business of the indorser, or with his family at his domicile.—*Id.*

See Husband and Wife, 3.

BOND—APPEAL; See Justices' Courts, 3.

BOND—ATTACHMENT; See Attachment.

BOND, INDEMNITY; See Replevin, 2.

BOND, RAILROAD; See Railroads.

BURDEN OF PROOF; See Bailment, 2; Practice, criminal, 9.

## C.

CATTLE; See Railroads, 9.

CERTIORARI; See Court, Kansas City Common Pleas; Officers, 4.

CONDEMNATION; See Railroads, 3, 4, 5; Springfield, City of, 1, 2, 3.

CONFLICT OF LAWS; See Female Suffrage.

CONSTITUTION OF MISSOURI; See Female Suffrage, 1; Special Judges, 1; Statute, construction of, 9.

CONSTITUTION OF UNITED STATES; See Female Suffrage, 1.

CONTRACTS.

1. *Contracts—Subscription, suit upon—Agency—Qui facit, etc.*—A, subscription paper embodied the following clause: "The undersigned agree to pay to A. B., the sums set opposite our names as a 'bonus' to induce him to complete the Southern Hotel in such manner as may be determined by the directors of the company, and A. B." In suit by the assignee of the paper against a signer, for the amount of his subscription; *held* no defense to the suit, that A. B. by payment of a certain sum procured the work to be done by others.—Southern Hotel Co. v. Chouteau, 572.

See Bills and Notes; Forcible Entry and Detainer, 3, 4; Landlord and Tenant; Mechanics' Liens, 1; Partnership; Railroads, 7, 8.

CONVEYANCES.

1. *Conveyance—Land—Description of property—Repugnancy.*—Whenever material or permanent objects are embraced in the calls of a survey or deed, these have absolute control, and a call may be rejected for inconsistency, when description enough still remains to ascertain and describe the land with certainty.—Cooley, v. Warren, 166.

CONVEYANCES, continued.

2. *Deeds—Acknowledgment—Wife's fee—Relinquishment of dower.*—Where the only defect in a certificate of acknowledgment is, that it includes a clause relinquishing the wife's dower, the acknowledgment is sufficient to carry her fee in the land.—Miller v. Powell, 252.

3. *Acknowledgments—Officer de facto—Collateral proceedings.*—An acknowledgment taken before a *de facto* officer is good and sufficient in a collateral proceeding, although there may have been a defect in his commission.—Hamilton v. Pitcher, 334.

4. *Conveyance to A. and her children—Title of A.*—Where a conveyance was made to M. W. P. and her children, "and to their heirs and assigns forever," *held*, that she and her children *in esse* took as tenants in common, and that she and her husband had power to convey her interest by mortgage. The number of such children could be ascertained, and the maxim would apply. "*Id certum est, quod certum reddi potest.*"—*Id.*

5. *Deed—Execution of power—Intendment.*—If from the language of a deed it is plain either by a reference to the power or otherwise, that it was intended to be made in the execution of a power, it will make the execution valid and operative.—Turner v. Timberlake, 371.

6. *Will—Life estate—Power contained in—Deed—Execution of power.*—Where by the provisions of a will a life estate in certain land was conferred upon the wife with power to alienate the same during her life, her deed of the land embodying a copy of the will, and alleging that the deed is executed "in consideration of the provisions of the will" sufficiently shows the intention of the grantor to execute the power contained in the will.—*Id.*

7. *Notary's certificate—When need not express itself as under seal.*—Where an actual seal of office is affixed to a notary's certificate, it is not rendered invalid by the failure of the officer to declare either in the testimonium or in the body of the certificate that it was attested by his seal.—Clark v. Rynex, 380.

8. *Married women—Title—Equity, etc.*—The title of a married woman to real estate, can only be divested by proceedings in equity.—*Id.*

9. *Lands and land titles—Condition broken, entry, etc.*—Where the grantee in a conveyance performed no part of the condition or consideration without which the deed was not to vest title, no formal entry for condition broken would be necessary on the part of a grantor who had remained all the time on the land.—Moore v. Wingate, 398.

10. *Conveyances—Condition broken—Entry for transfer—Chancery—Proceedings in, when proper.*—The grantor in a deed made on condition, may, after entry for condition broken, transfer the estate to a third party; or he may convey where the estate was only to vest on the performance of a condition which remained unperformed. And the transferee in such case, having a plain remedy at law, must resort to ejectment to dispossess the grantee in the original deed, and cannot invoke the aid of Chancery, unless where defendant in maintaining his claim would be shown to be throwing a cloud on his title.—*Id.*

11. *Lands and land titles—Conveyances by parol.*—Since the adoption of the common law in this State, conveyances of land cannot be made simply by parol.—Chapman v. Templeton, 463.

See Administration, 2; Husband and Wife, 2, 4, 5, 7; Mortgages and Deeds of Trust; Sheriff's Sales, 1, 2, 3, 5, 6, 9.

CORPORATIONS; See Mechanics' Liens, 1; Municipal Corporations; Practice, civil—Trials, 15; Railroads, 1.

COSTS.

1. *Costs—Judgment for—Prevailing party.*—In a suit brought in equity by the mortgagor against the mortgagee, for proceeds charged to have been realized by defendant from a fraudulent sale of the property, where the court finds the facts to be as charged, and the money to be due plaintiff, but further ascer-

COSTS, continued.

tains that the same is less than the debt secured by the mortgage, and orders the sum found to be due plaintiff to be entered as a credit upon the mortgage debt. *Held*, that within the meaning of the statute, (W. S., 343, § 6,) plaintiff is the prevailing party, and the court properly enters judgment in his favor for costs.—Hawkins v. Nowland, 328.

See Jury, 1; Witnesses, 1.

COUNTER-CLAIM; See Practice, civil—Pleading.

COUNTIES.

1. *Statutes, construction of—Organization of counties into municipal townships Acts of March 18, 1872, and March 24, 1873.*—The act of March 24, 1873, was not designed to interrupt the continuity of the act of March 18, 1872, so as to avoid or annul proceedings under it. The act of 1873 must be construed as a continuation of the act of 1872, both relating to the organization of counties into municipal corporations, the former being designed to correct supposed defects in the latter.—State, *ex rel.* v. Vernon County, 128.

2. *Statutes, construction of—Repeal—Acts done under.*—Acts done under a law are not rendered nugatory by the repeal of that law. (W. S., 895, § 5.)—*Id.*

COURT, CAPE GIRARDEAU COMMON PLEAS.

1. *Cape Girardeau Court of Common Pleas, jurisdiction of—Equity.*—The Cape Girardeau Court of Common Pleas has jurisdiction of equitable actions (Sess. Acts, 1853, p. 81.)—Fulenwider v. Fulenwider, 439.

2. *Cape Girardeau Court of Common Pleas—Jurisdiction—Mechanics' liens—Statute, construction of.*—The Cape Girardeau Court of Common Pleas has jurisdiction of actions for the enforcement of mechanics' liens. [Sess. Acts 1853, p. 81, § 1.]—Roth v. Tiedeman, 489.

COURTS, CIRCUIT; See Records, 1.

COURT, KANSAS CITY COMMON PLEAS.

1. *Certiorari, writ of—Kansas City Court of Common Pleas.*—Since the act of 1859, (Sess. Acts 1859–60, p. 10,) the Clerk of the Kansas City Court of Common Pleas has had authority to issue the writ of *certiorari*.—Hopkins v. Seiger, 232.

COURT, LAFAYETTE COMMON PLEAS; See Justices' Courts, 2.

COURT, POLK COUNTY CIRCUIT.

1. *Statute, construction of—Circuit Court of Polk county—Change of terms—Return of writs.*—The act of Jan. 26, 1864, changing the time of holding the Polk Circuit Court, did not require the writs already issued to be returned for correction as to the time of holding court, but made such writs returnable by force of the law to the substituted terms of court.—Freeman v. Thompson, 183.

COURT, PROBATE; See Administration.

COURT, SUPREME; See Practice, Supreme Court; *Quo Warranto*, 1, 3.

CRIMES AND PUNISHMENTS.

1. *Crimes and punishments—Rape—Passive policy—Half-way measures.*—The crime of rape can only be committed where there is on the part of her on whom the attempt is made, the utmost reluctance, and the utmost resistance. A passive course of conduct, or slight resistance is not sufficient, there must be no consent, however reluctant.—State v. Burgdorf, 65.

2. *Offenses—Association with thieves, aiding and abetting—Individual morality—Public protection.*—An individual may associate with thieves, &c., without being guilty of any offense, for it is not the business of the legislature to keep guard over individual morality; but if such person so associates with a design to aid, abet or promote, or in any way assist, the parties charged with, or suspected of, being thieves, prohibitory legislation may be applied, not to correct the evil consequences which such association may bring on the individual, but to protect society from actual or anticipated breaches of law.—City of St. Louis v. Fitz 582.

CRIMES AND PUNISHMENTS, continued.

3. *Ordinances—St. Louis, City of—Associating with thieves—Validity of.*—The ordinance of the city of St. Louis, (City Ord., Chap. 20, Art. 4, § 1,) prohibiting the "knowingly associating with persons having the reputation of being thieves and prostitutes," is void as invading the right of personal liberty. PER SHERWOOD, JUDGE, CONCURRING.—*Id.*

See Practice, criminal.

CRIMINAL LAW; See Crimes and Punishments; Practice, criminal.

CROPS; See Forcible Entry and Detainer, 3, 4; Landlord and Tenant, 2.

CURATORS; See Guardian and Ward.

## D.

DAMAGES.

1. *Damages—Personal injuries—Negligence—Owner of land—Liability of.*—The owner or occupant of real property is bound, so far as he may be able to do so by the exercise of ordinary care, to keep it in such condition that it will not, by any insufficiency for the purpose to which it is put, injure any passer-by; and he is bound also to use care and diligence to keep the premises in a safe condition for the access of persons who come thereon by his invitation express or implied for the transaction of business. But he is not bound to make the land or buildings thereon, safe for any purpose which is unlawful or improper, or for which he could not reasonably anticipate that they would be used, or for which they obviously were never designed. A mere passive acquiescence on the part of the owner or occupant in the use of real property by others, does not involve him in any liability to them for its unfitness for such use. No duty is imposed upon the owner or occupant, to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure, and who are not either expressly invited to enter, or induced to come upon them by the use for which the premises are appropriated and occupied, or by some preparatory adaptation of the place for use by customers or passengers, which might naturally and reasonably lead them to suppose that they might properly and safely enter.—Straub v. Soderer, 38.

2. *Damages—Streets, repair of—Negligence.*—Municipal corporations are bound to keep their streets in a reasonably safe condition. Failing to do so, they will be liable for all injuries resulting from their negligence.—Bassett v. City of St. Joseph, 290.

3. *Damages—Streets—Excavations bordering on—Liabilities of cities for damages, etc.*—The liability of municipalities for damages caused by excavations is not restricted to cases where they actually extend into the street; if travel is thereby rendered dangerous, the authorities are equally bound to protect the public, whether they encroach on the highway or not. And the city is bound for damages resulting from neglect of proper precautions, even though the excavations were not made by its own agents, provided, it had received due notice of the existing facts.—*Id.*

4. *Cities—Excavations—Dangerous condition of streets—Neglect of city to repair—Contributory negligence—Kick of a mule, etc.*—In a suit against a city to recover damages for injuries caused by plaintiff's falling into an excavation adjacent to a market place, where it appeared that the authorities were notified of the dangerous condition of the thoroughfare, and took no steps to guard the public from accident, and the evidence showed that plaintiff at the time of the casualty, was exercising ordinary care and prudence, plaintiff would be entitled to recover, although it further appeared, that the primary cause contributing to the injury was the attempt of a mule to kick plaintiff, and that in avoiding this peril, he fell or jumped into the excavation.—*Id.*

5. *Cities—Streets to be kept in repair to what extent—Streets opened.*—City authorities are only bound to keep such streets, and such parts of streets in repair, as are necessary for their convenience and use of the traveling public. When a street is opened for use, it should be put in a reasonably safe condition.—*Id*

DAMAGES, continued.

6. *Damages—Cities—Excavations unlawfully extending into streets—Variance.*—In a suit against a municipal corporation for damages caused by plaintiff's falling into a cellar adjacent to a public street, where the petition charged, that the excavation was unlawfully permitted to extend into the street; but the evidence showed, that it was not unlawful *per se*, but became unlawful only in event that it was unlawfully permitted to remain without protection; *held*, that the petition was good after verdict, notwithstanding such variance.—*Id.*

7. *Damages—Railroads, negligence of—Fire kindled from locomotive—Presumption—Speculative damages.*—Where grass is set burning by fire escaping from a locomotive, and the owner sues the company, negligence on the part of defendant will be presumed from the escape of the fire, and it devolves upon it, in order to rebut this presumption, to show that proper and safe locomotives and engines were used, and were conducted by the servants of the company in a proper and safe way. In such case the damages claimed would not be held too remote or speculative, although the property consumed was separated from the track by a strip of ground forty or fifty yards wide, where the plat was covered with dry grass and other combustible matter.—Clemens v. H. & St. J. R. R. Co., 366.

8. *Damages, remote or proximate—Issue as to, how disposed of—Instructions.*—Where doubt arises as to whether damages are proximate, or speculative and remote, the issue should be presented to the jury by proper instructions.—*Id.*

9. *Damages—Railroads—Contributory negligence—Allegations as to.*—In a suit for damages against a railroad company the petition need not allege, that plaintiff was at the time exercising due care, and not guilty of negligence contributing to the injuries received.—Loyd v. H. & St. J. R. R. Co., 509.

10. *Damages—Railroads—Jumping from train while in motion.*—In a suit against a railroad company to recover damages for injuries sustained by plaintiff in getting from the platform of the car upon that of the depot, the evidence showed, that the train stopped at the station only a minute; that during that time plaintiff's little child alighted; that plaintiff followed without delay, but after the train was in motion, and received her injuries in consequence of jumping from the train. *Held*, that plaintiff would not be barred of recovery by the fact, that she jumped from the train while in motion.—*Id.*

11. *Damages—Excessive—Remittitur, etc.*—Where the sum recovered as damages was reduced by remittitur to an amount satisfactory to the Judge who tried the cause, this court will not interfere.—*Id.*

12. *Damages, suit for—Surgeons called in to ascertain extent of injuries.*—The proposal of counsel in a damage suit, to have surgeons called in during the progress of the trial to examine plaintiff as to the extent of his injuries, is unknown to the law, and the court has no power to enforce such an order. *Id.*

See Landlord and T. 3; Municipal Corporations, 6, 7; Railroads, 7, 8, 9, 10.

DEPOSITIONS; See Practice, civil—Trials, 9.

DESCRIPTION; See Conveyances, 1; Sheriffs' Sales, 5, 6.

DISTURBING RELIGIOUS WORSHIP; See Practice, criminal, 17.

DIVORCE.

1. *Divorce—Judgment—Entries nunc pro tunc.*—Section 10 of the statute touching Divorces (W. S., 535) does not prevent *nunc pro tunc* entries, at a subsequent term, of the actual judgment or order that was made in the case but incorrectly entered on the records.—Moster v. Moster, 326.

2. *Practice, civil—Actions in rem—Divorce.*—A divorce suit is a suit *in rem*, and the *res* is the status of the plaintiff in relation to the defendant.—Ellison v. Martin, 575.

3. *Practice, civil—Publication—Non-Appearance—Divorce—Judgment in rem—Query.*—Whether in a divorce suit by publication, not followed by appearance, property can be brought before the court by describing it in the petition, and demanding a judgment *in rem* for alimony?—*Id.*

DOLLAR SIGN; See Practice, civil—Pleading, 6.

# E.

EJECTMENT.

1. *Ejectment—Matters dehors the record not to be inquired into.*—Matters not appearing on the face of the record cannot be inquired into collaterally in suit of ejectment.—Hardin v. McCanse, 255.

2. *Execution—Death of one defendant in—Issue of against survivor, effect of.*—In ejectment brought by the purchaser at execution sale, his title would not under the Statutes of 1855, (p. 741, § 20 and p. 905, § 18,) be defeated by the fact that one of the parties, against whom the execution issued, had died between the date of the judgment and that of the execution, where it appeared that the property levied on and sold was that of the survivor. Under that statute the execution although irregular would not be void.—*Id.*

3. *Ejectment—Possession—Title in wife.*—In order to show himself entitled to possession of land, party may prove title in his wife.—Bledsoe v. Simms, 305.

4. *Husband and wife—Her lands—Ejectment against—Who defendant.*—The husband is entitled to the possession of the wife's fee simple lands, and he is the proper and only party to be made defendant in a suit for lands claimed to belong to her.—*Id.*

5. *Ejectment—Prior possession short of statutory bar, will prevail when.*—In actions of ejectment, where no title appears on either side, the prior possession of plaintiff, though short of the statutory bar, will prevail over a subsequent possession of defendant, which has not ripened into a title, provided, that the prior possession be under claim of right, and not voluntarily abandoned. In such a case it must appear that the defendant is a mere trespasser; and that he or those under whom he claims, or from whom he obtained possession, entered upon the actual or constructive possession of the plaintiff.—*Id.*

See Sheriffs' Sales, 6.

ELECTIONS.

1. *Election—Ballots, not numbered cannot be counted—Const. of Stat.*—The provision of the statute concerning Elections (W. S., 566–67), that all ballots cast shall be numbered, and that ballots not numbered shall not be counted, is not merely directory but mandatory. And an officer, elected by votes not numbered as required by that statute, will, on contest raising that issue, be held to have forfeited his election.—West v. Ross, 350.

See Officers, 5, 6, 7.

EQUITY.

1. *Equity—Mortgage—Misdescription of land—Sale—Bill by purchaser to correct the description in the mortgage.*—A purchaser under a mortgage cannot come into equity, requesting that other property, in the place of that sold and purchased, be subjected to his purchase on the ground, that by mistake the mortgage covered different property from that intended.—Schwickerath v. Cooksey, 75.

2. *Equity—Mortgage—Misdescription of land—Sale—Bill by purchaser to correct the description in the mortgage—Privies.*—Equity will entertain a bill by a purchaser under a mortgage, requesting that other property, in the place of that sold and purchased, be subjected to his purchase, on the ground, that by mistake the mortgage covered different property from that intended,—as between the original parties and their privies. Per Adams, Judge, dissenting,—Napton, Judge, concurring.—*Id.*

3. *Equity—Note, judgment procured on by fraud—Sale and purchase under, effect of.*—Where the maker of a note, given for the purchase money of land, suffered the holder to procure judgment thereon, upon the strength of assurances from the latter that he intended to procure judgment merely to secure the debt, and that the judgment should be held in abeyance, and the holder afterwards, without the knowledge or consent of the maker, caused the land to be sold under the judgment, and bought it in; *held*, that the maker of the

EQUITY, continued.

note might resort to equity to have the sale set aside on payment of the note, and other proper relief administered. A title so obtained could stand only as security for the reimbursement of the debt.—Wright v. Barr, 340.

See Conveyances, 8, 10; Judgments, 2; Mortgages and Deeds of Trust; Practice, civil—Trials, 8.

ERROR, WRIT OF; See Practice, civil—Appeal.

ESTOPPEL.

1. *Estoppel—Privies.*—Privies in blood, in estate, or in law, are estopped from litigating that which is conclusive upon him with whom they are in privity.—Cooley v. Warren, 166.

See Trusts and Trustees, 1.

EVIDENCE.

1. *Evidence—Admissions of deceased persons as to resulting trusts.*—Testimony as to verbal admissions of persons, since dead, is to be received with great caution, and whenever it is attempted to prove resulting trusts by virtue of such admissions, the testimony must be clear, strong and unequivocal, and leave no room for doubt in the mind of the chancellor, as to the existence of such a trust. And the admissions should be supported by other circumstances going also to show the existence of the trust.—Ringo v. Richardson, 385.

See Attachments, 4; Bailment, 2; Husband and Wife, 1, 6, 7; Practice, civil—Trials, 7, 9, 10; Practice, criminal, 9, 10; Sheriff's Sales, 2, 3, 5, 6; Swamp lands, 1, 2; Wills, 2, 3; Witnesses, 2.

EXCEPTIONS; See Practice, civil—Appeal; Practice, criminal, 13.

EXECUTION.

1. *Execution—What estate vendible under—Purchase—Possession—Specific performance.*—The purchaser of land, who has paid the purchase money and taken possession, has an estate therein which is vendible on execution, notwithstanding the fact that by mistake the deed described other land. And the purchaser at the execution sale will succeed to all the rights which the judgment debtor had, to sue the original grantor for specific performance or reformation.—Morgan v. Bouse, 219.

2. *Execution—Death of one defendant in—Issue of, against survivor, effect of.*—In ejectment brought by the purchaser at execution sale, his title would not, under the Statutes of 1855, (p. 741, § 20 and p. 905, § 18,) be defeated by the fact that one of the parties, against whom the execution issued, had died between the date of the judgment and that of the execution, where it appeared that the property levied on and sold was that of the survivor. Under that statute the execution, although irregular, would not be void.—Hardin v. McCanse, 255.

See Garnishment, 1; Judgment, 1; Land and Land Titles, 1, 2; Sheriffs' Sales, 1.

## F.

FEMALE SUFFRAGE.

1. *Laws, conflict of—Constitution of Missouri—Registration laws—Constitution of the United States—14th Amendment.*—There is no conflict between the Constitution of the State and the registration laws, restricting the right of voting to male citizens, and the Fourteenth Amendment to the Constitution of the United States.—Minor v. Happersett, 58.

FIXTURES; See Mechanics' Liens, 3.

FORCIBLE ENTRY AND DETAINER.

1. *Forcible entry and detainer—Possession of defendant—Demand, etc.*—To sustain an action for forcible entry and detainer, defendant must be in actual pos-

FORCIBLE ENTRY AND DETAINER, continued.
session of the premises, or a part thereof, at the institution of the suit. To sustain such action, no prior demand for the possession need be made.—DeGraw v. Prior, 313.
2. *Forcible entry and detainer—What possession necessary to maintain.*—To establish the possession necessary to maintain forcible entry and detainer, plaintiff need only show that he entered the premises with a view to holding possession, and that his purpose was lawful. A subsequent merely temporary absence will not deprive him of his right. He must be in actual possession; but may be so either in person or by his agent.—*Id.*
3. *Forcible entry and detainer—Landlord and tenant—Crops—Tenants in common.*—By written agreement A. leased, let and rented his land for three years to B., to be surrendered up by B. at the end of the term. A. was to furnish all the teams necessary, and the first year all the seeds and farming utensils, and for the rest of the time half the seeds, and B. for his care of the place, &c., was to have one-half of the products of the land. B. went away, leaving his agents in possession, and upon his return, during the continuance of the lease, A. prevented him from taking possession of the land. B. brought an action of forcible entry and detainer against A. *Held*, that by this agreement, B. was the tenant of A., and that they were tenants in common of the crops; that, there being no evidence of abandonment or surrender, B. was entitled to the possession of the land.—Johnson v. Hoffman, 504.
4. *Forcible entry and detainer—Recoupment.*—In an action of forcible entry and detainer, the defendant cannot set up a breach of the contract of letting by way of recoupment.—*Id.*

FRAUD; See Equity, 3; Frauds, Statute of.

FRAUDS, STATUTE OF.
1. *Frauds, statute of—Goods worth over $30—Contract of sale, when not admissible in evidence.*—A contract of sale of goods, worth over $30, is not admissible in evidence, unless the buyer accepted part of the goods sold, and actually received the same, or gave something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing be made of the bargain, and signed by the parties or their agents lawfully authorized. [W. S., 657, § 6]—Delventhal v. Jones, 460.

FRAUDULENT CONVEYANCES.
1. *Fraudulent Conveyances—Personal property—Mortgages—Sale, bill of—Possession.*—In an action for the recovery of specific personal property by A. against D., it appeared that C. mortgaged this property to A., which mortgage was acknowledged and recorded. C. made a bill of sale of the same property to B., which was only intended to be a mortgage. This bill of sale was made after the first mortgage, but before the mortgage was acknowledged or recorded. The bill of sale was not acknowledged. C. remained in possession of the goods, but some months afterwards, and after the mortgage was recorded, B. took possession and sold the property to D. *Held*, that A. was entitled to recover the property from D.—Balke v. Swift, 85.

## G.

GARNISHMENT.
1. *Execution—Garnishment under—Interrogatories filed by plaintiff—Prior execution—Payments.*—Where plaintiff in an execution causes interrogatories to be filed and garnishees to be summoned, it is error for the court to order money, paid into court under those proceedings, to be turned over to the plaintiff on a prior execution against the same defendant; plaintiff in the first execution not having ordered interrogatories to be filed, or garnishees summoned. And *semble*, that no such steps can be taken on an execution by the sheriff without directions of plaintiff.—Pritchard v. Toole, 356.

GOVERNOR; See Officers, 2.

GRACE, DAYS OF; See Bills and Notes, 6.

GUARDIAN AND WARD.

1. *Curators—Statutes of 1855, construction of—New bond filed on order of the County Court—Liability of securities.*—Under the Revised Statutes of 1855, [825, § 18; 119, § 36; 120, §§ 39, 40, 41,] the giving of other or further security by a curator, as ordered by the County Court on its own motion, does not relieve the first bondsmen from any liability, but only operates as additional security; *semble*, that it would render both sets of securities equally liable as between themselves.—State v. Fields, 474.

H.

HABEAS CORPUS; See Officers, 3, 4.

HUSBAND AND WIFE.

1. *Husband and wife—Married women as witnesses—Construction of statute.*—Section 5 of the statute concerning Witnesses, (W. S., 1373) holding married women incompetent to testify as to admissions and conversations of their husbands, was intended to apply to all cases, whether the husband was a party or not.—Moore v. Wingate, 398.

2. *Husband and wife—Separate estate—What words create.*—Where by deed, or by decree of a court of equity, property is conveyed to a trustee "for the sole, separate and exclusive use, benefit and behoof" of certain parties, some of whom were unmarried females, such deed or decree creates a separate estate in such females, free from the control of any future husbands.—Metropolitan Bank v. Taylor, 444.

3. *Husband and wife—Separate estate—How charged.*—The separate estate of a married woman is liable for notes executed by her.—*Id.*

4. *Husband and wife—Separate estate—Deed, language of.*—In order to exclude the *jus mariti* in an estate conveyed to a woman, the expression in the deed of the intention to do this, must be clear and unequivocal. PER SHERWOOD, JUDGE, DISSENTING.—*Id.*

5. *Husband and wife—Separate estate—Deed, language of—Decree, reforming deed—Petition, uncontradicted allegations of.*—Property was conveyed to A. in trust for his wife B., and their children, C. D. and E., the said *cestuis que trust* were to have, hold and enjoy the same, with all the rights, improvements, &c., separate from said A., "their respective husband and father, as their sole, individual and exclusive property;" and the rents, profits and moneys accruing from the disposition of the property, or any part thereof, the said trustee was to pay over to the *cestuis que trust*, or their order. Afterwards a petition was filed to correct the deed, (B. was dead,) and give the trustee greater power of sale, which error in the deed was alleged to be the fault of the scrivener and to let in children subsequently born. The deed was corrected by the court. In the petition, whose allegations were not denied, C. and D. were alleged to have been under ten years of age, and E. only six months old, at the date of the deed. *Held*, that the deed, the decree, and the undenied allegations of the petition must be construed together, and that the husband of E. is not excluded from his marital rights in the interest of E. in this property.—*Id.*

6. *Witnesses—Competency of husband when joined with wife.*—Where husband and wife are joined as parties, the testimony of the husband is inadmissible. Sections 1 and 5 of the Witness Act (W. S., 1372-3) do not render him competent.—Paul v. Leavitt, 595.

7. *Married woman—Estate of—Deed vesting title in her—Separate estate, created how—Parol evidence as to deed.*—A deed to a married woman merely vesting in her a title in fee, but containing no provisions excluding the marital rights of the husband, will not create in her a separate estate which can be charged for her debts. And in suit for that purpose, testimony, showing, that the money of the wife paid for the lands; that the deeds were taken in her name

HUSBAND AND WIFE, continued
in consequence; that her husband always acted as her agent in buying and selling lands, etc., would be incompetent, as having the effect of varying the terms of the deed by parol testimony.—*Id.*

See Conveyances, 2, 8; Divorce; Ejectment, 3, 4.

## I.

INFANTS; See Guardian and Ward.

INNKEEPER; See Bailment, 1.

INSANITY; See Practice, criminal, 9.

INSTRUCTIONS; See Damages, 8; Practice, civil—Trials; Practice, criminal, 10.

INSURANCE DEPARTMENT; See Insurance, Fire, 1.

INSURANCE, FIRE.

1. *Insurance companies—Action by superintendent—Statement by company—Averment as to penalty—Insurance act, § 43.*—In proceedings brought at the instance of the superintendent of insurance, against a fire and marine insurance company, for violating § 23, Art. III, of the insurance law, (W. S., 769,) where the petition uses the language of the statute in describing the statement required to be filed, and charges that said statement was not made and filed "as required by the law," such averment does not render the petition bad on motion in arrest. It is not incumbent on plaintiff to show what the statement is required to contain. The requirements of that statute will be judicially noticed. For failure to comply with § 23, plaintiff is entitled to the penalty of $500 named in § 43. (State v. Matthews, 44 Mo., 523.)—State v. Case, 246.

INTERPRETATION · See Practice civil—Trials, 10.

## J.

JEOFAILS.

1. *Jeofails, statute of—Mechanic's lien—Date of furnishing supplies.*—In a suit on a mechanic's lien, the petition stated, that on a certain day, and within six months after furnishing the supplies, the plaintiff levied his lien, and the exhibit to the petition stated the dates and the items. *Held*, this was sufficient after verdict.—Jones v. Shaw, 68.

2. *Jeofails, Statute of—Practice, civil—Pleading—Allegation—Attachment bond.*—A petition on an attachment bond, which does not allege that the State sues, but sets forth by sufficient averments the title of B., for whose benefit the bond was made, and who is the real party in interest, and all the facts entitling him to recover, must be held good after verdict.—State to use v. Webster, 135.

3. *Jeofails, Statute of—Petition—Averments omitted—Verdict.*—When the necessary averments are omitted in the petition, such defect is not cured after verdict by the statute of amendments.—Town of Clinton v. Williams, 141.

4. *Jeofails, statute of—Judgment by default—Reversal—What errors cured.*—A judgment by default cannot be reversed, impaired, or in any way affected, by reason of the omission of any allegation or averment, which would have rendered the petition demurrable, nor for the omission of any allegation or averment, without proving which, the triers of the issue ought not to have given a verdict.—Robinson v. Mo. R. Construction Co., 435.

JUDGMENT.

1. *Judgment—Irregularity in—Execution—Motion to quash.*—Where a court has power to render judgment, any mere irregularity in the proceedings may be reached by appeal, or direct proceedings to vacate the judgment, but not by a motion to quash the execution.—Brackett v. Brackett, 265.

JUDGMENT, continued.

2. *Practice, civil—Judgment made final at return term on bill in chancery, may be set aside at next term, when.*—In counties where there are only forty thousand inhabitants, or the number is less, a judgment on a bill in chancery rendered for want of answer, and made final at the same time, may be set aside at a subsequent term; and the court may in the exercise of a sound discretion permit the defendant to plead over.—Dougherty v. St. Vincent's College, 579.

See Attachment, 7; Divorce, 1; Equity, 3; Jeofails, 4; Notice, 2, 3; Practice, civil, 1; Practice, civil—Appeal, 3, Practice, Supreme Court, 1, 10; Wills, 1.

JUDICIAL SALES; See Equity, 3.

JURISDICTION; See Administration, 5; Attachment, 3; Court, Cape Girardeau Common Pleas, 1, 2; Notice, 2, 3; Practice, criminal, 6; Quo Warranto, 1; Railroads, 9.

JURY.

1. *Juries—Board and lodging of—County, liability of.*—When a county is liable for the proper costs of a trial, it is liable for the board and lodging of the jury therein, provided by the sheriff in pursuance of the order of the court.—Watson v. Moniteau County, 133.

2. *Jury of six men—Waiver—Motion in arrest.*—Where a cause is tried by a jury of less than twelve men, unless the full panel be expressly waived by entry of record, that fact may be taken advantage of by motion in arrest. In such case no exceptions to the panel need be saved at the trial.—Cox and Slingsby v. Moss, 432.

JURY; See Officers, 4; Practice, civil—Trials, 11, 12, 13; Practice, criminal, 12; Springfield, City of, 2.

JUSTICES' COURTS.

1. *Justices' courts—Pleadings—Attachment—Plea in abatement—Inaccuracy.*—In a suit by attachment before a justice, the plea in abatement put the truth of the grounds for attachment, as alleged by plaintiff, in issue on the day of the making of the plea instead of on the day the affidavit for an attachment was made. *Held*, this was an inaccuracy committed by the justice, and might have been corrected by motion at the proper time, and is no ground for interference by this court.—Hamblin v. Dunn, 137.

2. *Justices' courts—Appeal—Lafayette County.*—Nothing in the acts relating to Lafayette Court of Common Pleas requires, that an appeal from a justice of that county should be taken to that court instead of the Lafayette Circuit Court, when the term of the former began soonest after the date of granting the appeal.—Smith v. Shore, 273.

3. *Justices' courts—Default—Appeal—Motion for new trial—Dismissal of judgment for costs.*—An appeal from a justice is properly dismissed, where appellant suffered default before the justice, and filed no motion to set the same side. A further judgment in such case in the Circuit Court, against the appellant and his sureties on the appeal bond for costs, is a nullity so far as the surety is concerned; but not such an error, as to reverse the judgment of dismissal.—Smith v. St. L., K. C. and N. R. R. Co., 338.

4. *Justices' courts—Voluntary appearance—Waiver of notice.*—The voluntary appearance of parties in a justice's court waives all defects in process, as e. g. notice of suit less than fifteen days before trial.—Griffin v. Van Meter, 430.

5. *Justices' courts—Cattle, damages to, by railroads—Jurisdiction.*—Justices of the peace have jurisdiction over suits against railroads for killing, maiming, &c. cattle, &c. in their respective townships, without regard to the value of the animals, or the amount of damages claimed. (W. S., 808, § 3.)—Hudson v. St. L., K. C. and N. R. R. Co., 525.

See Practice, civil—Trials, 15.

## K.

KANSAS CITY; See Court, Kansas City, Common Pleas; Municipal Corporations, 7.

## L.

LANDS AND LAND TITLES.

1. *Lands and Land Titles—Pre-emption Claims—Interest in Lands.*—A pre emption claim constitutes no interests in lands.—Bray v. Ragsdale, 170.

2. *Sheriffs' Sales—Pre-emption Claims.*—A pre-emption claim cannot be levied on and sold on execution.—*Id.*

See Conveyances, 3, 10; Ejectment; Execution, 1; Husband and Wife, 7; Limitations, 1, 2; Railroads, 3, 4, 5; Sheriffs' Sales, 5, 6; Swamp lands.

LAND COMMISSIONER; See Springfield, City of, 1, 2, 3.

LANDLORD AND TENANT.

1. *Lease—Attempts to rent to outsiders.*—An attempt by the lessor to rent premises to outside parties, where the lessees are in nowise thereby disturbed in their possession, does not *ipso facto* avoid the lease.—Mills v. Sampsel, 360.

2. *Landlord and tenant—Croppers on shares—Agreements.*—Where by agreement A. is to cultivate the land of B., and B. is to receive an agreed proportion of the crops, it is a question only determinable by the agreement in each case, whether the relation of landlord and tenant exists, or the parties are croppers on shares.—Johnson v. Hoffman, 504.

3. *Landlord and tenant—Attachment—Counter-claim for damages growing out of.*—In an action by attachment under the Landlord and Tenant Act for rent, defendant set up in defense an agreement of plaintiff to release him from all rent in arrear, if he would surrender possession before the expiration of his term; and to take care of what property he might leave on the place. *Held*, that defendant, having vacated the premises as agreed, might set up the contract in bar of plaintiff's claim for rent; but could not set up a counter-claim for damages caused by levy of the attachment upon his property remaining on the premises. His remedy for damages growing out of the attachment was by suit on the attachment bond.—Hembrock v. Stark, 588.

See Forcible Entry and Detainer.

LARCENY; See Practice, criminal, 1, 2, 3, 4.

LEASE; See Landlord and Tenant.

LIEN, MECHANIC'S; See Mechanics' Liens.

LIENS, VENDORS'; See Vendor's Lien.

LIMITATIONS.

1. *Limitations, statute of—Adverse possession of land—Payment of taxes.*—The continuous payment of taxes on land is not sufficient of itself to show adverse possession.—Chapman v. Templeton, 463.

2. *Limitations, statute of—Land, adverse possession of—Trespasser—Title, color of.*—A trespasser can acquire title, under the Statute of Limitations, only to so much land as he has the actual possession of; but one claiming under color of title, *bona fide* obtained, can acquire title to the whole tract, under the said statute, by possession of a part in the name of the whole.—*Id.*

3. *Limitations, statute of—Non-residents—Time when cause of action accrues.*—If, when the cause of action accrues, the party in default is a resident of another State, such non-residence does not prevent the running of the statute of limitations. (W. S., 919, § 16.) [Thomas vs. Black, 22 Mo., 330, affirmed.]—Scroggs v. Daugherty, 497.

See Attachment, 7.

LOST NOTE; See Bills and Notes, 5.

## M.

MANDAMUS.

1. *Mandamus—Prayer—Facts alleged and established—Circuit Court.*—The Circuit Court may disregard the prayer in the petition for a mandamus, and conform its final order to the facts alleged and established.—Osage Valley and S. K. R. R. v. Morgan County, 156.

See Railroads, 6.

MECHANICS' LIENS.

1. *Mechanics' liens—Person contracting with President of Railroad Company an original contractor.*—A party furnishing material to a Railroad Company under a contract with its President is an "original contractor" within the meaning of the mechanic's lien law. In such case the contracts of the President are those of the company.—Hearne v. C. & B. R. R. Co., 324.

2. *Mechanics' liens—Account—Statement of, what insufficient.*—A statement, merely showing the balance due, is not a sufficient statement of the account within the meaning of the mechanic's lien act (W. S., 909, § 5,) to create a lien.—Graves v. Pierce, 423.

3. *Mechanics' liens—Machinery must be in nature of fixtures—Contract must be what—Carding machines.*—The machinery, upon which a mechanic's lien can attach, under a proper construction of the statute, (W. S., 907, § 1,) must be such as is used in the erection of a building, and which will, when placed in the building, erection or improvement, become a fixture and a part of the reality; or at least such as is necessary in the erection of the improvements. And the material must be furnished under a contract either with the owner or the contractor for the building. The lien will not attach on account of a carding machine.—*Id.*

See Court, Cape Girardeau, Common Pleas, 2; Jeofails, 1.

MISTAKE; See Sheriffs' Sales, 4.

MORTGAGES AND DEEDS OF TRUST.

1. *Equity—Mortgage—Misdescription of land—Sale—Bill by purchaser, to correct the description in the mortgage.*—A purchaser under a mortgage, cannot come into equity, requesting that other property, in the place of that sold and purchased, be subjected to his purchase on the ground that by mistake, the mortgage covered different property from that intended.—Schwickerath v. Cooksey, 75.

2. *Equity—Mortgage—Misdescription of land—Sale—Bill by purchaser to correct the description in the mortgage—Privies.*—Equity will entertain a bill by a purchaser under a mortgage, requesting that other property, in the place of that sold and purchased, be subjected to his purchase, on the ground that by mistake the mortgage covered different property from that intended,—as between the original parties and their privies. Per ADAMS and NAPTON, J. J., DISSENTING.—*Id.*

3. *Fraudulent conveyances—Personal property—Mortgages—Sale, bill of—Possession.*—In an action for the recovery of specific personal property by A. against D., it appeared that C. mortgaged this property to A., which mortgage was acknowledged and recorded. C. made a bill of sale of the same property to B., which was only intended to be a mortgage. This bill of sale was made after the first mortgage, but before the mortgage was acknowledged or recorded. The bill of sale was not acknowledged. C. remained in possession of the goods, but some months afterwards, and after the mortgage was recorded, B. took possession and sold the property to D. *Held*, that A. was entitled to recover the property from D.—Balke v. Swift, 85.

4. *Mortgages—Legal title—Forfeiture—Possession by mortgagee.*—A mortgage conveys the legal title, and after forfeiture, the mortgagee, or those holding under him by foreclosure or color of title, may enter into possession, and hold it against the mortgagor. [Jackson vs. Magruder, 51 Mo., 55, affirmed.]—Jones v. Mack, 147.

MORTGAGES AND DEEDS OF TRUST, continued.

5. *Mortgages—Mortgage, assignee of—Possession—Redemption—Ejectment.*—A purchaser at a mortgagee's sale, who has paid the money, is substituted to the rights of the mortgagee; and in case the foreclosure is not legally conclusive, he cannot be dispossessed by the mortgagor by action of ejectment, but the mortgagor can redeem the property.—*Id.*

6. *Mortgages—School funds—Court, county—Order of sale—Sheriff, sale by—Ejectment.*—A sale of lands, mortgaged for school funds loaned, made by the sheriff without the proper order from the County Court, is a complete nullity, and such title is no *legal* defense to the purchaser against an action of ejectment by the mortgagor. Per SHERWOOD and VORIES, J. J., DISSENTING.—*Id.*

7. *Mortgages—Satisfaction—Law—Equity.*—Though a mortgage may be satisfied at law, yet equity will treat it as satisfied or not, in accordance with what it deems will best subserve and promote the equities of the case.—*Id.*

8. *Mortgages—Redemption of incumbrances by subsequent owner—Payment of usurious sums, etc.*—The owner of land has his action in equity to redeem it from an incumbrance placed upon it by a prior owner, by paying the amount justly due thereon, deducting from the incumbrance whatever part thereof consists of usurious interest; but he can make no deduction for usurious interest already paid by the former owner.—Perrine v. Poulson, 309.

9. *Sheriff's deed under mortgage—Recital as to order of sale, etc.*—A sheriff's deed under foreclosure of mortgaged land, is not invalid for failing to state that the County Court granted the order of sale in a case where no other court had jurisdiction. And a recital in the deed, that the order was issued "at the June adjourned term," is sufficiently definite without naming the day of the term, where this fact might be ascertained from the records of the court.—Warner v. Sharp, 598.

MORTGAGES AND DEEDS OF TRUST; See Costs, 1; Trusts and Trustees.

MUNICIPAL CORPORATIONS.

1. *Municipal corporations—Special taxes—Streets—Re-paving—Assessment of benefits.*—The power to grade and improve streets is a legislative power, and is a continuing one, unless there is some special restraint imposed in the charter of the corporation. It may be exercised from time to time, as the wants of the municipal corporation may require, and of the necessity or expediency of its exercise, the governing body of the corporation, and not the courts, is the judge; and it follows that the power to compel the property owners to pave generally, extends to compelling them to re-pave when required by the municipal authorities. If the first paving of a street is a special benefit to the front proprietor justifying the imposition on him of a portion of the expense, so the removal of an insufficient pavement and the making of a new and sufficient one in its stead, is a matter of special benefit to the front proprietor, although it may be also of general utility.—McCormack v. Patchin, 33.

2. *Corporations, municipal—Streets, improvement of—Assessments—Personal judgments, validity of—Statutes authorizing.*—Personal judgments against the owner of property in a city, on account of assessments for improvements of streets, &c., are null and void, and statutes authorizing such judgments are unconstitutional and void. [City of St. Louis v. Clemens, 36 Mo., 467, and *Id.* 49 Mo., 552 overruled.]—City of St. Louis, to use, etc. v. Allen, 44.

3. *Practice, civil—Judgments—Interest—Assessments for street improvements in City of St. Louis.*—The 15 per cent. interest in suits on assessments for street improvements should be allowed to the time of the verdict, but the judgment rendered thereon should bear six per cent. interest.—*Id.*

4. *Municipal corporations—Railroads, power to subscribe to.*—It is too late now to question the power of municipal corporations to subscribe to railroad corporations.—O. V. & S. K. R. R. Co. v. County Court of Morgan county, 156.

5. *Municipal corporations—Fire department—Fires, losses by—Liability.*—A grant, by the Legislature to a city, of power to establish a fire department, confers a legislative or discretionary power, and does not render the city liable, if the power is exercised, for losses occurring through fires.—Heller v. The Mayor, &c., of Sedalia, 159.

MUNICIPAL CORPORATIONS, continued.

6. *Corporations, municipal—Streets—Changing grade—Damages—Liability.*—A city is not liable for the damages which may accrue to a property owner merely from a change in the grade of the streets.—Schattner v. The City of Kansas, 162.

7. *Kansas, City of—Charter—Establishment of grades of streets—Maps thereof—Change thereof—Liability to an individual.*—The charter of the city of Kansas required the City Council, as soon as practicable, to establish the grades of all the streets in the city, to prepare and exhibit to public view a map thereof, and thereafter only to change such grade after due public notice, etc. *Held*, that the City could not be held liable in damages at the suit of a private party for not obeying this provision of its charter.—*Id.*

8. *Ordinances—Fines, suits for—Particularity of statements.*—In proceedings to recover a fine for violation of a town or city ordinance, it is sufficient if the statements inform the defendant with reasonable certainty of what he is called upon to answer. The technical accuracy of an indictment is not required. Town of Memphis v. O'Connor, 468.

9. *Ordinances of towns—Fines, suits for—Statements therein.*—A suit to recover a fine for breach of an ordinance of a town organized under W. S., Ch. 124, is a civil action. A complaint on such a cause of action, whose only charge is, "that the defendant committed a certain offense contrary to an ordinance of the town," is bad, and suit must be dismissed upon motion.—*Id.*

See Damages, 2, 3, 4, 5, 6; Springfield, City of; Statute, construction of, 5.

MURDER; See Practice, criminal, 5.

## N.

NEGLIGENCE; See Damages; Practice, civil—Trials, 16.

NEW TRIAL; Practice, civil—New Trials; Practice, criminal, 14, 15.

NON-RESIDENCE; See Limitations, 3.

NOTARY PUBLIC; See Bills and Notes, 9, 10; Conveyances, 7.

NOTICE.

1. *Practice, civil—Notice—Publication, order of—Sufficiency of.*—An order of publication, informing defendant that a suit had been commenced against him, founded on an account for the sum of $150, is a sufficient compliance with the statute.—Freeman v. Thompson, 183.

2. *Practice, civil—Publication—Non-appearance—General judgment.*—General judgments cannot be rendered against a defendant merely upon order of publication, and not followed by appearance of defendant.—Ellison, Sen. v. Martin, 575.

3. *Practice, civil—Publication—Non-Appearance—Divorce—Judgment in rem—Query.*—Whether in a divorce suit by publication, not followed by appearance, property can be brought before the court by describing it in the petition, and demanding a judgment *in rem* for alimony?—*Id.*

## O.

OFFICERS.

1. *Quo Warranto—Information—Attorney General—Private Person—Supreme Court—Jurisdiction.*—This court has jurisdiction of informations in the nature of *quo warranto*, whether filed by the Attorney General, or by a private person; though, where other tribunals have been provided for their adjudication, having all the power of this court (subject to appeal,) and more facilities for the trial of issues that may arise, this court has generally declined the investigation of such cases.—State v. Vail, 97.

OFFICERS, continued.

2. *Quo Warranto—Information—Public Officer—Commission from Governor, whether conclusive.*—A commission from the Governor is not a conclusive defense in an information in the nature of a *quo warranto*, for usurping a public office, whether the information be filed by the Attorney General or at the instance of a private party.—*Id.*

3. *Constitution, construction of—Supreme Court—Writs of Habeas Corpus, Quo Warranto, &c.—Bill of Rights—Informations for indictable offenses.*—The provision in the constitution authorizing this court to issue writs of *habeas corpus, quo warranto*, &c., and to hear and determine the same, necessarily assumes, that writs and informations are not criminal informations in the sense of the 11th section of the Bill of Rights, which prohibits criminal informations for indictable offenses.—*Id.*

4. *Constitution, construction of—Bill of Rights—Trial by jury—Habeas corpus—Quo Warranto—Certiorari.*—The 17th section of the Bill of Rights, declaring the right of trial by jury inviolate, is manifestly applicable to criminal proceedings proper, and cannot be understood to require this court on *habeas corpus*, or *quo warranto*, or *certiorari*, to summon juries.—*Id.*

5. *Elections—Votes—Secretary of State—County Clerks—Commissions—Governor—Ministerial Acts.*—In opening and casting up the votes at an election, the County Clerk, or Secretary of State, has no discretion, and cannot determine upon the legality of the votes, and it is the duty of the Governor to issue the commission in accordance with the result so ascertained. All of these officers act ministerially and not judicially.—*Id.*

6. *Elections—Majority candidates—Disqualifications, not patent—Who elected.*—The candidate, who at an election receives the greatest number of votes except the successful candidate, is not entitled to the office, when the successful candidate is ineligible owing to personal disqualifications, and such as were not patent to the voters.—*Id.*

7. *Quo Warranto—Informations—Public Offices—Elections—Illegal Votes.*—Upon an information in the nature of a *quo warranto* for usurpation of an elective public office, qualifications of electors cannot be inquired into.—*Id.*

8. *Quo Warranto—Informations—Attorney General—Public Offices.*—Upon an information in the nature of a *quo warranto* filed by the Attorney General for usurpation of an elective public office, the qualifications of another party, not the incumbent, for the office cannot be inquired into.—*Id.*

9. *Quo Warranto—Informations—Who can file—What judgment for relator—Statute of Anne.*—Neither in this State, nor under the Statute of Anne, is the relator in an information in the nature of a *quo warranto* necessarily a claimant for the office, but he must have a special interest in the matter, which interest is a preliminary question for the determination of the court upon his application to file the information; and the court can give no judgment for the relator except so far as costs are concerned; and his title is not necessarily examined into, except so far as it may incidentally or indirectly affect the right of the defendant.—*Id.*

See Practice, civil—Pleading, 7.

ORDINANCES; See Crimes and punishments, 3; Municipal Corporations.

## P.

PARTNERSHIP.

1. *Partners—Joint funds—Speculation by one.*—Generally one partner cannot speculate with the partnership funds for his individual benefit.—Brown v. Schackelford, Exr., 122.

2. *Partners—Joint funds—Speculation by one—Damages.*—A. B. & C. shipped goods jointly from America to D. in England to sell for them. A. on his private account drew a bill of exchange on D., but this action did not cause nor

PARTNERSHIP, continued.

affect the sale of the property: D. sold this bill of exchange, there being at the time a great difference in price between gold and U. S. Treasury notes. A. invested the money so realized, and lost by his investments. D. in settling with the partners, charged them interest for the money advanced to A. on account of the bill of exchange. *Held*, that this interest in gold was the amount due from A. to the other partners.—*Id.*

PAYMENT; See Bills and Notes, 3.

POWERS; See Conveyances, 5; Wills, 4, 5, 6.

PRACTICE, CIVIL.

1. *Judgment—Reinstatement of cause after lapse of term.*—After the term, at which final judgment in a cause is rendered, has elapsed, the court has no power to reinstate the cause upon the docket, or to take any further steps. And motions for new trial and in arrest, filed for the first time at the subsequent term, are *coram non judice*, and must be disregarded, notwithstanding such reinstatement. [W. S., 1059, §§ 6, 11.]—Danforth v. Lowe, 217.

See Notice, 1; Special Judges, 1, 2, 3.

PRACTICE, CIVIL—ACTIONS; See Attachment; Divorce; Mandamus; Quo Warranto; Railroads, 10; Replevin; Sheriff's Sales, 4.

PRACTICE, CIVIL—APPEAL.

1. *Practice, civil—Appeal—Transcript—Service—Jury waived.*—The objections, that the appellant was not served, and that a jury trial was not waived, cannot be sustained in this Court, when the transcript states to the contrary.—Jones v. Shaw, 68.
2. *Practice, civil—Error, writ of—Exceptions, bill of—Exceptions saved.*—On a writ of error, no exceptions being saved and no bill of exceptions filed, judgment will be affirmed.—Shields v. Shields, 136.
3. *Judgment, final—Appeal.*—A judgment for defendant, which is merely one for costs, is not a final one, and will not authorize an appeal.—Moran v. Plankinton, 243.
4. *Bill of exceptions—Motion in arrest, not reviewed without.*—In the absence of any bill of exceptions, the Supreme Court will not review the action of the trial court on motion in arrest. Such motion being no part of the record proper, can only be brought up by bill of exceptions.—Peacher, Adm'r, &c. v. Patrick, 251.

See Judgment, 1; Justices' Courts, 2, 3; Practice, civil—Trials, 2, 3; Practice, Supreme Court.

PRACTICE, CIVIL—NEW TRIAL.

1. *New trial—Newly discovered evidence must be not merely cumulative.*—To authorize a court to set aside a verdict on the ground of newly discovered evidence, it must be shown to be material and not merely cumulative, and it must appear that it could not have been obtained by reasonable diligence on the former trial.—Mills, Ex'r. v. Sampsel, 360.

PRACTICE, CIVIL—PARTIES.

1. *Practice, civil—Pleadings—Defect of parties.*—The objection of defect of parties can be raised only by demurrer or answer. (W. S., 1014, § 6; 1015, § 10.)—Reugger v. Lindenberger, 364

See Administration, 5.

PRACTICE, CIVIL—PLEADING.

1. *Practice, civil—Pleadings—Counts—Separate causes of action—Account.*—Several assessments on a stockholder of a company in payment of his subscription, after they all become due, are in the nature of an account made at several times, all of the items of which being added together make a single cause of action.—K. C. Hotel Co. v. Sigement, 176.
2. *Practice, civil—Motion in arrest—Errors in pleadings—Improper joinder—Supreme Court.*—The objection, that several causes of action are united in

PRACTICE, CIVIL—PLEADING, continued.

one count, will not be considered by the Supreme Court, unless that point was raised before the lower court in the motion in arrest.—*Id.*

3. *Practice, civil—Pleadings—Counter-claims.*—A. sued B. and C. on mechanic's lien for material furnished for B.'s house under a contract with C., the contractor for building. B. in his answer denied all knowledge of A.'s furnishing any materials, and denied that A. gave him any notice of his lien; then as a counter claim B. alleged, that A. guaranteed that C. should build the said house in a workman-like manner, and complete it by a certain date, and asserted that neither condition was fulfilled, and claimed damages for their breach. *Held*, that this defense was admissible in this suit as a counter-claim, and was not inconsistent with the prior defenses.

Law of counter-claim and set-off reviewed *in extenso*.—McAdow v. Ross, 199.

4. *Practice, civil—Demurrer as to cause of action must specify what.*—Where plaintiff states no cause of action whatever, a demurrer merely alleging that the petition "does not state facts sufficient to constitute a cause of action," without further specifying in what particulars the pleading is defective, is nevertheless a good demurrer. But where the petition states a cause of action, a demurrer, which goes to some minor, and not necessarily fatal, imperfections, must specifically state them.—Morgan v. Bouse, 219.

5. *Amending pleadings—What amendments do not change nature of claim or defense.*—In suit on a note, where the petition alleges that plaintiff is administrator of A., and that the note was executed by defendant to "A.," the pleading may under the Practice Act (W. S., 1035, §§ 3 and 7,) be amended by adding, that the note was transferred from "A" to "B;" that plaintiff sues as the administrator of B. Such amendment does not change the nature of the claim or defense.—Harkness, Adm'r. v. Julian, 238.

6. *Practice, civil—Pleadings—Abbreviations, use of—Money.*—The indication of Federal money by Arabic figures, preceded by the sign ($) to indicate dollars, and the cutting off of the last two figures by a dot to indicate cents, is permissible. (W. S., 420, § 15.) [Goodall vs. Harrison, 2 Mo., 153, overruled.] —Fulenwider v. Fulenwider, 439.

7. *Practice, civil—Pleadings—Necessary allegations—Replevin.*—In an action of replevin for the seal of the court, and a book called a "fee-book," the defendant answered, that he held these articles by virtue of a writ issued by the judge of that court, (W. S., 1136, § 5,) and copied the writ into the answer. *Held*, that the writ and its recitals constituted no defense, but the answer must allege affirmatively, the authority of the judge to issue the writ, that defendant was clerk of the court, and that the plaintiff had been removed from said office upon conviction of misdemeanor in office.—Flentge v. Priest, 540.

See Attachment, 2, 5; Husband and Wife, 5; Insurance, fire, 1; Jeofails; Judgment, 2; Landlord and Tenant, 3; Mechanics' Liens, 2; Practice, civil —Parties, 1.

PRACTICE, CIVIL—TRIALS.

1. *Practice, civil—Trials—Verdict, general—Several counts—Arrest of judgment —Reversal.*—Where there are several causes of action stated in a petition, and a general verdict is rendered on the whole petition in favor of the plaintiff, if the lower Court refuse to arrest the judgment, this Court will reverse it.—City of St. Louis v. Allen, 44.

2. *Practice, civil—Trials—Evidence, exclusion of—Injury—Reversal*—When the exclusion of evidence has not injured the appellant, it is no ground for the reversal of the judgment.—Harris v. Hays, 90.

3. *Practice, civil—Trials—Instructions—Theory of case.*—The refusal of an instruction, based on a different theory from that on which both parties tried the case, is no ground for a reversal.—*Id.*

4. *Wills—Devisavit vel non—Judgment.*—Upon an issue of *devisavit vel non* the final order of the court should establish or reject the will—*Id.*

PRACTICE, CIVIL—TRIALS, continued.

5. *Wills—Devisavit vel non—Burden of proof—Circuit Court.—Semble*, that the better practice is, to regard proceedings to establish a will, as proceedings *in rem*, and to require formal proof of the execution of the will from those propounding it, even though it has been already admitted to probate.—*Id.*

6. *Court sitting as a jury—Conflict of evidence—Instructions, etc.*—Where the court sits as a jury, and the evidence is conflicting, it errs in giving an instruction that upon the evidence plaintiff is entitled to recover.—DeGraw v. Prior, 313.

7. *Practice, civil—Evidence—Close of testimony—Subsequent proof.*—In suit by a bank, where through inadvertence proof of its incorporation was omitted, the court might in its discretion permit the proof to be made, although the plaintiff had announced the case as closed.—German Saving Bank v. Marks, 382.

8. *Practice, civil—Instructions in chancery proceedings.*—It is not error to refuse instructions in equitable proceedings in the nature of a bill in chancery.—Moore v. Wingate, 398.

9. *Practice, civil—Trials—Depositions—Informalities—Objection, when to be made.*—Objections to depositions on the ground of irregularities come too late at the trial. The proper way is to file a motion to suppress the depositions.—Delventhal v. Jones, 460.

10. *Practice, civil—Trials—Written instruments—Who interprets.*—It is the duty of the court to ascertain and interpret the meaning of written instruments as a matter of law, and the duty cannot be shifted to the jury in the shape of questions of fact.—State v. LeFaivre, 470.

11. *Practice, civil—Jury—Arguments before—Statements by counsel, etc.*—An advocate ought not to be allowed to make himself a witness and to state facts not in evidence touching the case under discussion. And it is the duty of the judge to check such statements.—Loyd v. Han. & St. Jo. R. R., 509.

12. *Practice, civil—New trial, motion for—Address to jury—Statements not in evidence made in, etc.*—Where the trial judge overruled a motion for new trial based upon the affidavit of a bystander, setting forth certain statements not in evidence made by counsel in addressing the jury, ordinarily the Supreme Court will not interfere. The court who heard the speech is the proper tribunal to judge of its character and effect on the jury.—*Id.*

13. *Practice, civil—Trials—Jurors, competency of—Challenge.*—Jurors were asked, "whether, if the evidence were evenly balanced between plaintiff, an individual, and defendant, a corporation, which way would you incline to find?" They answered, that they would incline to find for the plaintiff. They were then challenged for cause. The court then asked them, if they thought they could try the case fairly, and without prejudice or bias; to which they replied affirmatively. *Held*, that, taking both answers together, the jurors were not incompetent, that jurors are not to be expected to know the rules of law about the weight of evidence, until instructed thereupon by the court.—Hudson v. St. L., K. C. & N. R. R., 525.

14. *Practice, civil—Trials—Instructions—Questions of law.*—Instructions involving questions of law ought not to be given, unless other instructions are also given explaining those questions.—*Id.*

15. *Practice, civil—Trials—Corporations, suits against—Existence of, proof of—Justices' courts.*—It is not necessary, on a trial in the Circuit Court of a cause originally brought before a justice against a corporation, for the plaintiff to prove defendant's corporate existence, when defendant has appeared and defended as a corporation, has executed bonds filed in the cause authenticated by its corporate seal, and in every way, that it could be done, recognized its corporate existence, and tried and defended the case on the merits to final judgment in its corporate name.—*Id.*

16. *Practice, civil—Instructions—Gross negligence.*—An instruction declaring that a party was responsible only for gross negligence, without defining what was in law "gross negligence," is improper.—Wiser v. Chesley, 547.

17. *Practice, civil—Instructions, etc.*—Instructions, not predicated upon the issues tried, should not be given.—Gilchrist v. Donnell, 591.

See Jury, 2; Practice, civil—New trials; Special Judges; Verdict, 1

PRACTICE, CRIMINAL.

1. *Practice, criminal—Indictment—Grand Larceny—Allegations—Unknown owner.*—An indictment for grand larceny may charge that the property stolen belonged to a person unknown to the jurors.—State v. Casteel, 124.

2. *Practice, criminal—Indictment—Larceny—Strays—Posting.*—A stray may be the subject of larceny before it is posted.—*Id.*

3. *Practice, criminal—Statute, construction of—Indictment—Grand Larceny—Essential averments.*—In an indictment for grand larceny, at common law and under W. S., 456, § 25, the words "feloniously" and "stole" are essential averments.—*Id.*

4. *Practice, criminal—Statute, construction of—Indictment—Larceny—Averments.*—In an indictment for larceny of a stray under W. S., 461, § 46, it may not be necessary to use the word "steal," as it is not used in the description of the offense in the statute.—*Id.*

5. *Practice, criminal—Indictment—Murder in the first degree—Verdict for a lesser degree—New trial—Effect of.*—An indictment for murder in the first degree, followed by a verdict for a lesser degree, followed by the granting of a motion for a new trial, operates as an acquital to the defendant of the charge of murder in the first degree; yet he can be tried again, as well for the same offense, as for any of the minor offenses which are embraced in an indictment for murder in the first degree. [State v. Ross, 29 Mo., 39, affirmed.] The line of defense, which the prisoner may design to pursue at a subsequent trial, does not affect the question.—State v. Smith, 139.

6. *Statute, construction of—Bigamy—Apprehension—Indictment—Allegation—Jurisdiction.*—When a court acquires jurisdiction in an indictment for bigamy only by virtue of the arrest of the prisoner within the limits of its jurisdiction, [W. S. 499, § 4,] the indictment must allege the apprehension of the prisoner within the limits of said jurisdiction prior to the finding of the indictment.—State v. Griswold, 181.

7. *Criminal law—Failure to plead, fatal after verdict.*—Where, in a criminal proceeding no plea to the accusation is entered on behalf of the prisoner, such fact will prove fatal after verdict. The error cannot then be cured by entry of plea *nunc pro tunc*.—State v. Saunders, 234.

8. *Practice, criminal—Verdict set aside—Prisoner held over—Final judgment.*—The action of the court in setting aside the verdict of the jury in a criminal proceeding, where the prisoner is held for another trial, is not a final judgment from which appeal will lie.—State v. Brannon, 244.

9. *Practice, criminal—Evidence—Insanity—Burden of proof.*—The question of insanity is simply one of fact and to be proved like any other fact. The evidence to establish it should reasonably satisfy the minds of the jury that the accused was insane when the act was committed. The burden of proving insanity is on the defendant.—State v. Smith, 267.

10. *Evidence—Instructions as to particular facts.*—It is not the province of the Court to select certain facts shown by the evidence and tell the jury how much or what or whether any weight shall be attached to them.—*Id.*

11. *Criminal law—Complaint—Venue.*—In criminal proceedings for assault and battery, the complaint of the prosecutor filed with the justice is a part of the proceedings, and an averment therein, that the offense was committed in the county, sufficiently lays the venue.—State v. Foye, 336.

12. *Criminal law—Indictment for attempted rape—Challenge and list of jurors.*—In indictment for attempted rape, defendant is not entitled to a peremptory challenge of twelve jurors.—(W. S., 449-50, § 32; 1102, § 4.) Nor is he entitled to a list of the jurors forty-eight hours before trial. (W. S., 1102, § 8.)

13. *Practice, criminal—Exceptions not taken in progress of trial, effect of.*—Exceptions, taken in the progress of a trial, occupy the same footing and are governed by the same rules in criminal as in civil cases. And where exceptions are not saved to the rulings of the court, they will not afterward be noticed, though the trial be of a criminal nature.—*Id.*

PRACTICE, CRIMINAL, continued.

14. *New trial—Motion for—Cumulative evidence.*—The discovery of new evidence, which is merely cumulative, is no ground for a new trial.—*Id.*

15. *New trial—Motion for, should show what.*—In order to obtain a new trial on ground of newly discovered evidence, the applicant must show, 1st. That the evidence has come to his knowledge since the trial: 2nd—That it was not owing to want of due diligence that it did not come sooner: 3rd—That it is so material, that it would probably produce a different result if the new trial were granted: 4th—That it is not cumulative: 5th—The affidavit of the witness himself should be produced or his absence accounted for: 6th—It should appear that the object of the testimony is not merely to impeach the character or credit of a witness.—*Id.*

16. *Practice, criminal—Final judgment—Appeal.*—In criminal, as in civil cases, no appeal will lie without final judgment; as where on demurrer sustained, none was rendered.—State v. Mullix, 355.

17. *Practice, criminal—Indictment—Disturbing religious worship.*—An indictment for disturbing a congregation met for religious worship, etc., (W. S., 504, § 30) is not sustained by evidence of a disturbance in the church-yard after the congregation had been dismissed.—State v. Jones, 486.

See Crimes and Punishments.

PRACTICE, SUPREME COURT.

1. *Practice, civil—Supreme Court—Final judgment.*—A writ of error will be dismissed when there was no final judgment in the court below.—Shaw v. Dinwiddie, 132.

2. *Practice, civil—Motion in arrest—Errors in pleadings—Improper joinder—Supreme Court.*—The objection, that several causes of action are united in one count, will not be considered by this court, unless that point was raised before the lower court in the motion in arrest.—Kansas City Hotel Co. v. Sigement, 176.

3. *Practice, Supreme Court—Statement and brief.*—Where plaintiff in error fails to file a statement and brief, the writ will be dismissed.—Appleby v. McElhannon, 210.

4. *Appeal to Supreme Court, dismissed when.*—When appellant files no statement or brief, or assignment of errors, the appeal to the Supreme Court will be dismissed.—Kite v. Cox, 237.

5. *Practice, Supreme Court—Assignment of errors.*—Where appellant files no assignment of errors, the appeal will be dismissed.—State v. McCracken, 245.

6. *Practice, Supreme Court—Points not presented in motion for new trial, not examined afterward.*—Grounds of objection, not set forth in motion for new trial, will not be heard in the Supreme Court.—Carver v. Thornhill, 283.

7. *Practice, civil—Supreme Court—Evidence, re-examination of.*—Where there is any evidence to sustain a verdict, the testimony will not be weighed by the Supreme Court.—*Id.*

8. *Supreme Court—Evidence, weight of.*—In law cases, this court will not weigh the evidence.—H. & N. L. Plank R. Co. v. Bowling, 311.

9. *Practice civil—Exceptions not saved on trial below.*—Where exceptions are not saved at the time, the rulings of lower courts will not be reviewed above.—DeGraw v. Prior, 313.

10. *Practice, civil—Appeal—Final judment.*—Where, on appeal to the Supreme Court, the record shows a verdict for plaintiff and that the Court ordered judgment rendered accordingly, but no entry of the judgment appears in the record, the appeal will be dismissed.—Dale v. Copple, 321.

11. *Practice, civil—Supreme Court—Verdict.*—In law cases, where there is any legal evidence tending to uphold the finding, this court will not weigh the evidence.—Bush & Son v. Christian, 483.

PRE-EMPTION; See Land and Land Titles, 1, 2.

PRESUMPTIONS; See Bills and Notes, 3.

PRINCIPAL AND AGENT; See Agency.

PRINCIPAL AND SURETY.

1. *Principal and sureties—Prior suit against principal, when unnecessary.*—The condition of a bond was, that a holder should not prosecute the sureties till he had exhausted all legal remedies against the principal. *Held,* that where the principal was totally insolvent and nothing could be realized out of him on execution, it was unnecessary to bring suit against the principal before proceeding against the sureties.—Heralson v. Mason, 211.

PROCESS; See Service.

PUBLICATION; See Notice, 1.

## Q.

QUO WARRANTO.

1. *Quo Warranto—Information—Attorney General—Private Person—Supreme Court—Jurisdiction.*—This court has jurisdiction of informations in the nature of *quo warranto*, whether filed by the Attorney General, or by a private person; though, where other tribunals have been provided for their adjudication, having all the power of this court (subject to appeal,) and more facilities for the trial of issues that may arise, this court has generally declined the investigation of such cases.—State v. Vail, 97.

2. *Quo Warranto—Information—Public Officer—Commission from Governor, whether conclusive.*—A commission from the Governor is not a conclusive defense in an information in the nature of a *quo warranto*, for usurping a public office, whether the information be filed by the Attorney General or at the instance of a private party.—*Id.*

3. *Constitution, construction of—Supreme Court—Writs of Habeas Corpus, Quo Warranto, &c.—Bill of Rights—Informations for indictable offenses.*—The provision in the constitution authorizing this court to issue writs of *habeas corpus, quo warranto*, &c., and to hear and determine the same, necessarily assumes, that writs and informations are not criminal informations in the sense of the 11th section of the Bill of Rights, which prohibits criminal informations for indictable offenses.—*Id.*

4. *Constitution, construction of—Bill of Rights—Trial by jury—Habeas corpus—Quo Warranto—Certiorari.*—The 17th section of the Bill of Rights, declaring the right of trial by jury inviolate, is manifestly applicable to criminal proceedings proper, and cannot be understood to require this court on *habeas corpus*, or *quo warranto*, or *certiorari*, to summon juries.—*Id.*

5. *Elections—Votes—Secretary of State—County Clerks—Commissions—Governor—Ministerial Acts.*—In opening and casting up the votes at an election, the County Clerk, or Secretary of State, has no discretion, and cannot determine upon the legality of the votes, and it is the duty of the Governor to issue the commission in accordance with the result so ascertained. All of these officers act ministerially and not judicially.—*Id.*

6. *Elections—Majority candidates—Disqualifications, not patent—Who elected.*—The candidate, who at an election receives the greatest number of votes except the successful candidate, is not entitled to the office, when the successful candidate is ineligible owing to personal disqualifications, and such as were not patent to the voters.—*Id.*

7. *Quo Warranto—Informations—Public Offices—Elections—Illegal Votes.*—Upon an information in the nature of a *quo warranto* for usurpation of an elective public office, qualifications of electors cannot be inquired into.—*Id.*

8. *Quo Warranto—Informations—Attorney General—Public Offices.*—Upon an information in the nature of a *quo warranto* filed by the Attorney General for usurpation of an elective public office, the qualifications of another party, not the incumbent, for the office cannot be inquired into.—*Id.*

QUO WARRANTO, continued.

9. *Quo Warranto—Informations—Who can file—What judgment for relator—Statute of Anne.*—Neither in this State, nor under the Statute of Anne, is the relator in an information in the nature of a *quo warranto* necessarily a claimant for the office, but he must have a special interest in the matter, which interest is a preliminary question for the determination of the court upon his application to file the information; and the court can give no judgment for the relator except so far as costs are concerned; and his title is not necessarily examined into, except so far as it may incidentally or indirectly affect the right of the defendant.—*Id.*

## R.

RAILROADS.

1. *Revenue—Personal property—Where taxable—Railroads—Rolling stock.*—Personal property which is capable of having an actual *situs*, is taxable in the county where it is situated; but other personal property which has no *situs*, is taxable in the county where the owner resides. Rolling stock of a railroad company which is in a county, which is not the legal residence of the corporation, only in transit or temporarily, is not taxable in such county; but is to be assessed and taxed in the county which is the legal residence of such corporation.—Pacific R. R. v. Cass Co., 17.

2. *Municipal Corporations—Railroads, power to subscribe to*—It is too late now to question the power of municipal corporations to subscribe to railroad corporations.—O. V. & S. K. R. R. Co. v. County Court of Morgan County, 156.

3. *Railroads—Lands, condemnation of—Commissioners—Report, motion to set aside—Review.*—In proceedings to condemn lands for railroad purposes, the proceedings being regularly conducted, the opinion of the commissioners on the facts submitted to them, and also the propriety of the instructions or declarations of law asked on a motion to set aside the report of the commissioners, cannot be examined into, nor reviewed in this court.—Lee v. Tebo & Neosho R. R. Co., 178.

4. *Railroads—Lands, condemnation of—Commissioners, order of reference to—Review.*—In proceedings to condemn lands for railroad purposes, the propriety of the order appointing the commissioners, which contained their instructions, is subject to examination by this court.—*Id.*

5. *Railroads—Lands, condemnation of—Benefits, what are.*—When lands are condemned for railroad purposes, the benefits to be assessed to the owner, with reference to the remainder of his land, are such as his land derives from the road over and above the benefits to his neighbors, whose land is not taken.—*Id.*

6. *Railroads—Iron Mt. R. R.—Sale of—Unpaid balance of purchase money—Construction of statute—State interest fund.*—The Cairo and Fulton R. R. and the St. Louis & Iron Mt. R. R., were sold by the State for $900,000. At the sale, $225,700 was paid, leaving a balance of $674,300 to be paid on time. By § 8 of the Act of March 17th, 1868, (Sess. Acts 1868, p. 95,) it was provided, that the unpaid balance of $664,300, "together with all interest that might accrue thereon," should be appropriated to building a branch road from Pilot Knob to the Arkansas State line. *Held*, that under this act, the road last named was entitled to an appropriation of $664,300, and not $674,300. And held further, that notwithstanding that act, under the act touching State interest, etc., (W. S., 1280,) the road last named would have no claim to the interest on said unpaid balance which had been collected and applied by the State Treasurer to the State interest and sinking fund. Mandamus against the State to enforce the payment of the $10,000, or the amount of the interest paid over, would not lie.—St. L. & I. M. R. R. v. Clark, 214.

7. *Railroads—Seat in car—Ticket—Surrender of.*—A passenger on a railroad train, who exhibits his ticket and demands a seat, need not surrender the ticket till the seat is furnished.—Davis v. K. C., St. J. and Council Bluffs R. R. Co., 317.

RAILROADS, continued.

8. *Damages—Railroad passenger ticket—Refusal to surrender—Expulsion from train—Failure to furnish seat, etc.*—A. buys a ticket from Winthrop to Bigelow on the K. C. & St. J. R. R. The cars are crowded. He refused to surrender his ticket till provided with a seat, and is ordered to leave the train when it shall arrive at Forest City. At this point he procures a seat, and subsequently tenders his fare from thence to Bigelow; but refuses to pay fare from Winthrop, or to give up his ticket. Thereupon the conductor declines the amount offered, and not receiving his ticket, ejects him from the train.

In an action for damages by A., based on the original contract for transportation entered into at Winthrop, *held*, that under the contract, A. would not be entitled to ride from Forest City to Bigelow without surrendering his ticket, or tendering his full fare from Winthrop, and could not maintain his action; although the case might be different, where plaintiff set up a new contract entered into at Forest City, and based his action thereon.—*Id.*

9. *Justices' courts—Cattle, damages to, by railroads—Jurisdiction.*—Justices of the peace have jurisdiction over suits against railroads for killing, maiming, &c., cattle, &c. in their respective townships, without regard to the value of the animals, or the amount of damages claimed. (W. S., 808, § 3.)—Hudson v. St. L., K. C. & N. R. R., 525.

10. *Railroads—Suits against, how brought—Injuries to individuals—Statutes, construction of.*—The statute concerning suits against railroads, providing that the penalties therein mentioned shall be sued for in the name of the State (W. S. 309, § 36; 310, 311, §§ 38, 42, 43,) so far as the rights of individuals to recover for damages received are concerned, is a remedial and not a penal statute, and, at most, only can be construed to give an additional method of prosecuting such suits —*Id.*

11. *Railroads—Summons—Service on depot-agent.*—A summons against a railroad is properly served on its depot-agent by the constable.—*Id.*

See Damages, 7; Mechanics' Liens, 1; Revenue, 2.

RAPE; See Crimes and Punishments, 1; Practice, criminal, 12.

RECORDS.

1. *Courts, Circuit, records of—Verity of, assailed collaterally.*—The verity of the records of the Circuit Courts cannot be impeached collaterally.—Freeman v. Thompson, 183.

RECOUPMENT; See Forcible Entry and Detainer, 4.

RENT; See Landlord and Tenant.

REPEAL; See Statute, construction of, 1, 6.

REPLEVIN.

1. *Replevin, action of, between joint owners.*—Replevin will not lie in behalf of one against another of two joint owners of personal property.—Cross v. Hulett, 397.

2. *Replevin—Indemnity bond—Officers, liability of—Statute, construction of.*—The taking of an indemnity bond from the plaintiff by an officer, who has seized property under an execution, does not release the officer, nor the plaintiff ordering or assenting to such action, from liability to a replevin suit by the owner of the property.—Belkin v. Hill, 492.

See Practice, civil—Pleading, 7.

REVENUE.

1. *Revenue—Taxation—Exemption from—Presumptions.*—Where exemption from taxation is claimed under any law, it must not be from presumption. The abandonment of the sovereign right to exercise this vital power can never be presumed; the intention to abandon it must appear in the most clear and unequivocal terms.—Pacific R. R. Co. v. Cass Co., 17.

2. *Revenue—Assessment—Board of Equalization—Notice.*—The Assessor of Cass County for 1869 made no assessment of the property of the Pacific Railroad, and his assessment book, when returned, contained no entry in relation to

REVENUE, continued.

said road. Subsequently, the County Board of Equalization verbally ordered an entry to be made on the assessor's book of an assessment by themselves of taxes against said road for said year, 1869. This order and entry were made without notice to the railroad. No taxes were charged against the railroad on the tax-book for 1869, or on the delinquent book for that year, until Dec., 1871, when an entry was made by order of the County Court of that date, without notice to the company, ordering that the assessment made by the Board of Equalization, and the taxes thereon, be placed on the copy made by the clerk for the use of the collector, and that the clerk make out a copy for the use of the collector. *Held*, that such assessment was clearly without authority of law and void. 1st. Because no notice was given as required by the act of 1868. 2nd. Because the Board had no authority to make an assessment. It had power to increase or diminish the valuation made by the assessor, but had no power to make an assessment of its own.—*Id.*

3. *Revenue—Personal property—Where taxable—Railroads—Rolling stock.*—Personal property, which is capable of having an actual *situs*, is taxable in the county where it is situated; but other personal property, which has no *situs*, is taxable in the county where the owner resides. Rolling stock of a railroad company, which is in a county which is not the legal residence of the corporation, only in transit or temporarily, is not taxable in such county; but it is to be assessed and taxed in the county which is the legal residence of such corporation.—*Id.*

4. *Municipal corporations—Special taxes—Streets—Re-paving—Assessment of benefits.*—The power to grade and improve streets is a legislative power, and is a continuing one, unless there is some special restraint imposed in the charter of the corporation. It may be exercised from time to time, as the wants of the municipal corporation may require, and of the necessity or expediency of its exercise the governing body of the corporation, and not the courts, is the judge; and it follows that the power to compel the property owners to pave generally, extends to compelling them to repave when required by the municipal authorities. If the first paving of a street is a special benefit to the front proprietor justifying the imposition on him of a portion of the expense, so the removal of an insufficient pavement, and the making of a new and sufficient one in its stead, is a matter of special benefit to the front proprietor, although it may be also of general utility.—McCormack v. Patchin, 33.

## S.

ST. LOUIS, CITY OF; See Crimes and Punishments, 2, 3; Municipal Corporations, 3.

SALES; See Sheriffs' Sales; Trusts and Trustees, 2; Vendor's Lien.

SCHOOLS AND SCHOOL LANDS.

1. *Statute, construction of—School districts—Towns—Territory outside of corporate limits attached.*—Territory outside of town limits may be taken in and attached for school purposes. (W. S., 1262, § 1.)—State, *ex rel.* Nesbitt v. Board of Education of Appleton City, 127.

2. *Schools—Township boards—Contracts—Suits by teachers for salary—Statutes, construction of.*—A suit could be brought against a Township Board of Education by a teacher employed by the local directors for his salary, under the Statutes of 1865, (Chap. 46.)—Puterbaugh v. Township Board of Education, 472.

SEAL; See Conveyances, 7.

SEPARATE ESTATE; See Husband and Wife.

SERVICE; See Notice, 1; Railroads, 11.

SHERIFF; See Statute, construction of, 9.

SHERIFFS' SALES.

1. *Statute, construction of—Executions, statute on—Sheriff's sales—Essential recitals.*—The names of the parties to the execution, the date when issued, the date of the judgment, the description of the property, and the time, place and manner of sale, are essential recitals in a sheriff's deed, for property sold on execution (W. S., 612, § 54); all the other provisions relative to the recitals therein, may be regarded as simply directory.—Wilhite v. Wilhite, 71.

2. *Sheriffs' deeds—Acknowledgment, certificate of—Extrinsic evidence.*—The certificate of acknowledgment by a sheriff to a deed must be within and of itself complete, and no extrinsic evidence can be invoked to eke out its recitals. [Samuels v. Shelton, 48 Mo., 444.]—McClure v. McClurg, 173.

3. *Sheriff—Deeds—Acknowledgment—Open court—Informality.*—An acknowledgment of a deed by a sheriff, certified to by the clerk of court and stated by him to be entered of record in the records of said court, is not invalidated because stated to be taken before the judge. It is evident that the clerk used the words "Judge of the court" as synonymous with "court," and it may be regarded as a mere informality.—*Id.*

4. *Sheriff's sale—Substitution of purchaser instead of the original vendee—Mistake as to title—Action for money paid.*—Where a third party refunds to the purchaser at an execution sale the amount of his bid, and is substituted in his stead as purchaser, but it afterward transpires, that, contrary to the understanding of both parties, the land is that to which defendant in the execution had no title, the substituted purchaser will have no action against the original vendee for the amount of the purchase money paid over.—Cravens v. Gordon, 287.

5. *Sheriff's deed—Vagueness of description—Parol testimony to identify, when admissible.*—It may be considered as now settled in this State, that parol evidence is admissible to identify land vaguely described in a sheriff's deed; and it is proper to show, that the tract was well known by the description given; provided, that the description was sufficient to prevent persons from being misled as to the identity of the land, and to prevent a sacrifice of it at the sale.—McPike v. Allman, 551.

6. *Sheriff's deed—Vagueness of description in—Parol evidence.*—In ejectment, plaintiff claimed under a sheriff's deed, which described the land as "eighty acres, part of the west half of section thirty-one, township fifty-three, range five," and recited that the sale was made by virtue of an execution against John B. Crow. Parol evidence was introduced, which showed that the tract was not known in the community by the description of "eighty acres part of the west half," etc.; but that it was known as the land of Crow; that the land and the surrounding land was prairie; that Crow owned no other land in the immediate neighborhood; that it was generally known, that he had sold the north 120 acres of the section, and owned no land in the half section but eighty-three acres on the south end.

*Held*, that the sheriff's deed was not void by reason of its vagueness, and that the sale passed the title.—*Id.*

See Land and Land Titles, 2; Mortgages and Deeds of Trust, 9.

SPECIAL JUDGES.

1. *Statutes, constitutionality of—Special Judge.*—The Act [Sess. Acts 1870, p. 200, § 15,] authorizing the appointment of a special judge to try a cause, when an application has been made for a change of venue on account of the prejudice, &c., of the judge of the court, is valid. [Harper v. Jacobs, 51 Mo., 296, affirmed.]—Smith v. Haworth, 88.

2. *Statutes, construction of—Special laws—Departures from general rules.*—Special laws,, that give origin to new and unexpected departures from general rules, should be closely scrutinized, and the powers therein conferred strictly construed.—*Id.*

3. *Courts—Special judges—Transcript.*—When a cause is tried by a special judge, appointed for that purpose, the transcript should show that the order of appointment was entered of record.—*Id.*

SPECIAL TAXES; See Revenue, 4.

SPRINGFIELD, CITY OF.

1. *Land Commissioner—Condemnation of land—Assessment of damages—Separate action for.*—The verdict of a Land Commissioner's jury, awarding damages to the owner of land condemned for public use, is not exclusive of other remedies, where the charter provides no method of coercing payment from the city of the sum awarded. In such case the land owner may, notwithstanding such verdict, bring his independent action against the city for the assessment and recovery of damages —Jamison v. City of Springfield, 224.

2. *Land Commissioner—Attempt to agree as to compensation—Assessment of damages to each property holder.*—Where a City Charter provides, that in condemning private property for public use, "if the amount of the compensation cannot be agreed upon, the Mayor shall cause the same to be assessed by a jury," etc., but the record of the proceedings before the Land Commissioner shows no attempt on the part of the city to agree with the land owner as to such compensation; and where the record shows that the Mayor impaneled the jury "to assess the damages to each and every property holder;" but further recites, that the jury simply stated in their finding, "that no private property holder sustained any damage," etc. *Held*, that such proceedings are wholly insufficient to divest the land owner of his title to the property (See Anderson v. City of St. Louis, 47 Mo., 479; Leslie v. City of St. Louis, etc., *Id.*, 474.)—*Id.*

3. *Land, condemnation of—Claim for damages caused by bringing street near door of plaintiff, etc.*—In suit against a city corporation for damages caused by the condemnation of a part of his lot of ground, he cannot claim compensation for "the damage and inconvenience caused plaintiff by bringing the street near his door." The measure of damages in such a case is the fair and reasonable value of the land taken.—*Id.*

STATUTE, CONSTRUCTION OF.

1. *Statute, construction of—Repeal—Later general affirmative statute does not repeal former which is particular, except when.*—A statute can only be repealed by express provision of a subsequent law, or by necessary implication. To repeal a statute by implication there must be such a positive repugnancy between the new law and the old, that they cannot stand together or be consistently reconciled. There should be a manifest and total repugnancy in the provisions of the new law, to lead to the conclusion that the later law abrogated, or was designed to abrogate, the former. A later statute, which is general and affirmative, does not abrogate a former one which is particular, unless negative words are used, or unless the acts are irreconcilably inconsistent. —Pacific R. R. v. Cass Co., 17.

2. *Statute, construction of—Executions, statute on—Sheriffs' sales—Essential recitals.*—The names of the parties to the execution, the date when issued, the date of the judgment, the description of the property, and the time, place, and manner of sale, are essential recitals in a sheriff's deed, for property sold on execution (W. S., 612, § 54); all the other provisions relative to the recitals therein may be regarded as simply directory. [Not in harmony with Crittenden v. Leitensdorfer, 35 Mo., 239.]—Wilhite v. Wilhite, 71.

3. *Statutes, constitutionality of—Special Judge.*—The Act [Sess. Acts 1870, p. 200, § 15,] authorizing the appointment of a special judge to try a cause, when an application has been made for a change of venue on account of the prejudice, &c. of the judge of the court, is valid. [Harper v. Jacobs, 51 Mo., 296, affirmed.]—Smith v. Haworth, 88.

4. *Statutes, construction of—Special Laws—Departures from general rules.*—Special laws, that give origin to new and unexpected departures from general rules, should be closely scrutinized, and the powers therein conferred strictly construed.—*Id.*

5. *Statutes, construction of—Organization of counties into municipal townships—Acts of March 18, 1872, and March 24, 1873.*—The act of March 24, 1873, was not designed to interrupt the continuity of the act of March 24, 1872, so as to avoid or annul proceedings under it. The act of 1873 must be construed

STATUTE, CONSTRUCTION OF, continued.

as a continuation of the act of 1872, both relating to the organization of counties into municipal corporations, the former being designed to correct supposed defects in the latter.—State v. County Court of Vernon County, 128.

6. *Statutes, construction of—Repeal—Acts done under.*—Acts done under a law are not rendered nugatory by the repeal of that law. [W. S., 895, § 5.]—*Id.*

7. *Statutes, construction of—Laws inconsistent—Repeal of.*—The general rule is *leges posteriores priores contrarias abrogant*, but it has limitations.—*Id.*

8. *Statutes, construction of—General and particular statutes, prior and subsequent.*—A subsequent, general and affirmative act does not abrogate a prior one, which is particular, unless negative words are used, or unless the two acts are irreconcilably inconsistent; but a subsequent act, special in its character, conferring a direct grant of power, must prevail over a prior act refusing such power.—St. Louis v. The Life Ass. of America, 466.

9. *Statutes, construction of—Records obtained by warrant—Constitutionality.*—The statute, (W. S., 1136, § 5,) authorizing a judge of the Supreme or Circuit Court to issue his warrant to a sheriff, commanding him to seize the books, &c., belonging to an office, detained by the former incumbent thereof, and deliver them to the proper officer, is not unconstitutional. It merely places the property in the custody of the law. It determines no right to the property, and leaves to claimants their legal remedies for the recovery of the same.—Flentge v. Priest, 540.

STATUTES, CONSTRUED.

ADMINISTRATION, 2, (W. S. 98, §§ 35, 37,) 3, (W. S. 887, § 6,) 5, (Sess. Acts 1865, 85).
ATTACHMENTS, 4, (W. S. 188, § 24).
BILLS AND NOTES, 5, (W. S. 813–14, §§ 9, 10,) 6, (W. S. 216, § 15; 217, § 18).
COSTS, 1, (W. S. 343, § 6).
COURT, CAPE GIRARDEAU COMMON PLEAS, 1, 2, (Sess. Acts 1853, 81).
COURT, KANSAS CITY COMMON PLEAS, 1, (Sess. Acts 1859, §10).
DIVORCE, 1, (W. S. 535, § 10).
ELECTIONS, 1, (W. S. 566–67).
EXECUTIONS, 2, (R. C. 1855, 741, § 20; *Id.* 905, § 18).
FRAUDS, STATUTE OF, 1, (W. S. 657, § 6).
GUARDIAN AND WARD, 1, (R. C. 1855, 825, § 18; 119, § 36; 120, §§ 39, 40, 41).
HUSBAND AND WIFE, 6. (W. S. 1372, §§ 1, 5).
INSURANCE, FIRE, 1, (W. S. 769, §§ 23, 43).
LIMITATIONS, 3, (W. S. 919, § 36).
MECHANICS' LIENS, 2, (W. S. 909, § 5;) 3, (W. S. 907, § 1).
PRACTICE, CIVIL, 1, (W. S. 1059, §§ 6, 11).
PRACTICE, CIVIL—PARTIES, 1, (W. S. 1014, § 6; 1015, § 10).
PRACTICE, CIVIL—PLEADING, 5, (W. S. 1035, §§ 3, 7;) 6, (W. S. 420, § 15;) 7, (W. S. 1136, § 5).
PRACTICE, CRIMINAL, 3, (W. S. 436, § 25;) 3, (W. S. 461, § 46;) 6, (W. S. 499, § 4;) 12, (W. S. 449–50, § 32; 1402, §§ 4, 8;) 17 (W. S. 504, § 30).
RAILROADS, 6; 9, (W. S. 808, § 3;) 10, (W. S. 304, § 36; 310, 311, §§ 38, 42, 43).
SCHOOLS AND SCHOOL LANDS, 1, (W. S. 1262, § 1).
SWAMP LANDS.
WITNESSES, 3, (W. S. 1373, § 5).

STREETS; See Damages, 2, 3, 4, 5, 6; Municipal Corporations, 6, 7; Revenue, 4; Springfield, City of, 1, 2, 3.

SUBSCRIPTION; See Contracts, 1.

SURETIES; See Attachment, 3; Bills and Notes, 2, 7, 8; Guardian and Ward, 1; Justices' Courts, 3; Principal and Surety.

SWAMP LANDS.

1. *Swamp lands—Patent—Act Sept. 28th, 1850—Effect of—Secretary of the Interio, —Parol evidence identifying land.*—The Act of Congress of September 28th 1850, to enable the State of Arkansas and other States to reclaim the swamp lands within their limits (9 U. S. Stat., 519,) constituted a present grant, vesting an absolute title *proprio vigore* in the State of Missouri to such lands within her limits without issue of patent. The failure of the Secretary of the Interior to afterward perform his duty, in making out the lists and plats of the lands, and transmitting them to the governor, did not in any wise interfere with, or impair, the title. And in ejectment for such land, parol evidence is admissible for the purpose of identifying the same, as, in fact, swamp and over flowed land.—Clarkson v. Buchanan, 563.

2. *Swamp lands—List of, in office of Register of lands—Effect of, as evidence.*—A list of the swamp lands, certified from the office of the Register of is presumptive evidence that the list is a legal and correct one.—*Id.*

## T.

TAXES; See Revenue; Trusts and Trustees, 2.

TOWNS; See Municipal Corporations.

TRANSCRIPT; See Practice, civil—Appeal, 1

TRESPASS; See Limitations, 2.

TRUSTS AND TRUSTEES.

1. *Trusts—Consent to appointment of trustees, not authorized by law—Sale of property—Estoppel.*—In case of refusal of a trustee, appointed under a deed of trust, to act in the premises, the court has no authority to appoint any person to carry out the trust except the sheriff of the county; but where all parties interested in the trust advised and consented to such appointment, and permitted such appointee to execute the trust and make *bona fide* sales of the estate; and it appears that the purchasers made permanent and valuable improvements on the property; and that the proceeds were applied to the satisfaction of the debts secured by the trust deed; they will be estopped in equity from disputing the authority of the trustee or the validity of the sales.—Hereford v. Nat. Bk. of Missouri, 330.

2. *Trustees' sales—Proceeds—Taxes—Prior incumbrances.*—Taxes due are a legal charge on lands, and ought to be paid before a sale under a deed of trust; but if this is not done, the trustee cannot apply the proceeds of the sale to the payment of the taxes, nor can he to the payment of a prior incumbrance, unless there was a special understanding or agreement, that, in order to make a clear title to the purchaser, the trustee should pay off the prior incumbrance.—Scott v. Shy, 478.

See Equity; Mortgages and Deeds of Trust.

## V.

VENDOR'S LIEN.

1. *Vendor's lien—Enforcement of—Land of wife—Money paid husband.—Semble*, that the wife is not a necessary party to an action for the enforcement of the vendor's lien on land belonging to the wife, and in which the husband had a marital interest, when by the terms of the sale the purchase money was to be paid to the husband.—Reugger v. Lindenberger, 364.

VERDICT.

1. *Verdict—Penalties for failure to pay toll—General verdict of "not guilty"—Weight of evidence, etc.*—In an action to recover penalties for passing a toll-gate without paying toll and for tolls due the plaintiff, although the causes of action embraced in the suit were distinct and separate, and separately stated,

VERDICT, continued.

a general verdict, if the judgment is for the defendant, is sufficient; if the judgment were for the plaintiff, it might be necessary to render a separate verdict on each separate cause of action.—H. & N. L. Plank Road & Bridge Co. v. Bowling, 311.

See Jeofails, 1; Practice, civil—Trials, 1; Practice, criminal, 5, 8.

## W.

WILLS.

1. *Wills—Devisavit vel non—Judgment.*—Upon an issue of *devisavit vel non* the final order of the court should establish or reject the will.—Harris v. Hays, 90.
2. *Wills—Devisavit vel non—Burden of proof—Circuit Court.*—*Semble,* that the better practice is, to regard proceedings to establish a will as proceedings *in rem,* and to require formal proof of the execution of the will from those propounding it, even though it has been already admitted to probate.—*Id.*
3. *Wills—Parties—Witnesses.*—Parties in interest are competent witnesses in proceedings to establish a will.—*Id.*
4. *Wills—Construction of—Powers.*—In the construction of wills, any words however informal, which clearly indicate an intention to give or reserve a power, are sufficient for the purpose.—Turner v. Timberlake, 371.
5. *Will—Construction of—Power of sale by widow.*—A will contained the following provisions: "It is my will that all my just debts be fully paid; and for that purpose, I desire my wife to sell of my lands the W. 1-2, S. W. 1-4," etc., "together with my black woman Hannah. I give and bequeath to my wife and my two children the remainder of all my estate and effects, after payment of my debts, to be disposed of in any manner that she may think best; so that the property or its effects may be appropriated to her use and benefit during her natural life; and at her death the remainder of the property, or its effects, may be appropriated to the use and benefit of my two children." *Held,* that under the will the wife was not limited to a life estate in the property, but that all of it might be sold before her death.—*Id.*
6. *Will—Life estate—Power contained in—Deed—Execution of power.*—Where by the provisions of a will a life estate in certain land was conferred upon the wife with power to alienate the same during her life, her deed of the land embodying a copy of the will, and alleging that the deed is executed "in consideration of the provisions of the will," sufficiently shows the intention of the grantor to execute the power contained in the will.—*Id.*

WITNESSES.

1. *Subpœnas—Service of, by parties—Costs not taxable for.*—Parties may serve subpœnas, but fees for such service cannot be recovered as costs.—H. & N. L. Plank R. Co. v. Bowling, 311.
2. *Evidence—Witness—Impeachment of—What foundation must be laid.*—To impeach a witness on the ground that he has made contradictory statements, his attention must be called to the time, place and circumstances, and the persons to whom the statements were made.—State v. Foye, 336.
3. *Administrator—Appraisement—Jurat, etc.*—An administrator's sale is not rendered void by reason of the fact that the person taking the affidavit of the appraisers subscribes himself as administrator.—Moore v. Wingate, 398.

See Evidence; Husband and Wife, 1, 6; Wills, 3.